No. 91-2019-CSY
Status: GRANTED

Title: Minnesota, Petitioner
v.
Timothy Dickerson

Docketed:
June 17, 1992

Court: Supreme Court of Minnesota

Counsel for petitioner: Wolfe,Beverly J.

Counsel for respondent: Gorman,Peter W.

Entry	Date	Note	Proceedings and Orders
1	Jun 17 1992	G	Petition for writ of certiorari filed.
2	Jul 13 1992		Brief of respondent Timothy Dickerson in opposition filed.
3	Jul 17 1992	G	Motion of Minnesota County Attorneys Association, et al. for leave to file a brief as amici curiae filed.
4	Jul 22 1992		DISTRIBUTED. September 28, 1992
5	Jul 29 1992	X	Reply brief of petitioner filed.
6	Aug 24 1992	X	Supplemental brief of respondent Timothy Dickerson filed.
7	Oct 5 1992		Motion of Minnesota County Attorneys Association, et al. for leave to file a brief as amici curiae GRANTED.
8	Oct 5 1992		Petition GRANTED.
			**********
9	Nov 2 1992		Record filed.
		*	Original proceedings Minnesota Appellate Court.
10	Nov 5 1992		Record filed.
		*	Original proceedings Fourth Judicial District Court, Hennepin County, Minnesota.
11	Nov 18 1992		Brief amicus curiae of United States filed.
12	Nov 18 1992		Joint appendix filed.
13	Nov 18 1992		Brief of petitioner filed.
16	Nov 19 1992		Brief amici curiae of Americans For Effective Law Enforcement, Inc., et al. filed.
14	Dec 4 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
15	Dec 14 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
17	Dec 21 1992		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
18	Dec 21 1992		Brief amici curiae of American Civil Liberties Union, et al. filed.
19	Dec 23 1992		Brief of respondent Timothy Dickerson filed.
20	Dec 28 1992		SET FOR ARGUMENT WEDNESDAY MARCH 3, 1993. (1ST CASE).
21	Jan 5 1993		CIRCULATED.
22	Jan 25 1993	X	Reply brief of petitioner filed.
23	Mar 3 1993		ARGUED.

(1)

91-2019

No. 92-____

In the Supreme Court of the United States

October Term, 1992

STATE OF MINNESOTA,

Petitioner,

vs.

TIMOTHY DICKERSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Fourth Amendment to the United States Constitution permit a "plain feel" exception to its warrant requirement clause for seizures of objects where a police officer develops, through the *sense of touch* during a lawful pat down, probable cause to believe that the suspect possesses contraband or other evidence of a crime?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

No.____

STATE OF MINNESOTA,
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vs.

TIMOTHY DICKERSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

The Hennepin County Attorney, on behalf of the State of Minnesota, respectfully petitions for a writ of certiorari to review the judgment of the Minnesota Supreme Court entered in this proceeding on March 20, 1992.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court, reproduced and attached to this Petition as Appendix A, is reported at 481 N.W.2d 840 (Minn. 1992). The opinion of the Minnesota Court of Appeals, reproduced and attached to this Petition as Appendix B, is reported at 469 N.W.2d 462 (Minn. Ct. App. 1992). The order of the Fourth Judicial District Court (trial court), reproduced and attached to this Petition as Appendix C, is unreported.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Minnesota Supreme Court was entered on March 20, 1992. This petition for a writ of certiorari was filed within ninety days of the Minnesota Supreme Court's decision.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1992).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

The charged offense in this case concerned the illegal possession of cocaine. The cocaine was discovered as the result of an investigative stop and a protective pat down search of Respondent Timothy E. Dickerson. The facts concerning the stop and search are set forth in the trial court's findings of fact which read as follows:

> 1. At approximately 8:15 p.m., on November 9, 1989, Officer Rose of the Minneapolis Police Department was on routine patrol in his squad in the area of 10th and Morgan Avenue North in the City of Minneapolis, Hennepin County.
> 2. Rose is a 14-year veteran of the Department, having served 11 1/2 years in North Minneapolis. Over the past two years, he has participated in approximately 75 drug search warrant executions and made between 50 and 75 drug arrests.
> 3. Officer Rose had personally participated in search warrants at the address at 1030 Morgan Avenue North resulting in drug seizures as well as seizures of guns and knives.
> 4. Officer Rose had personally responded to complaints at this address of drugs being sold in the hallways.
> 5. On the evening in question, Officer Rose observed the [Respondent], a man unknown to him, come out of the front door of the address at 1030 Morgan Avenue North and walk towards the street. Officer Rose observed that when the

man saw the squad car, he made an abrupt turn and walked towards the alley.

6. Rose and his partner drove into the alley where they stopped [Respondent].

7. Officer Rose conducted a pat search of the [Respondent] for weapons. Officer Rose felt a small, hard object wrapped in plastic in [Respondent's] pocket.

8. Based upon his training and experience, Officer Rose formed the opinion that the object in [Respondent's] pocket was crack/cocaine and removed it. Subsequent testing revealed this to be .20 grams of crack/cocaine.

(Appendix C-1-2).

On December 19, 1989, Respondent was charged with the offense of controlled substance crime in the fifth degree.[1] At a pretrial hearing, Respondent moved to suppress the crack cocaine on the ground that the stop and pat down search violated the Fourth and Fourteenth Amendments of the United States Constitution. Both Officer Rose and Respondent testified at this hearing concerning the events leading up to the seizure of the cocaine.

Officer Rose testified that when he conducted a pat down of Respondent's "very fine nylon" jacket, he "felt a lump, a small lump, in the front pocket. [He] examined it with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane" (T.9).[2] Officer Rose also testified

1. Minn. Stat. § 152.025, subd. 2(1), subd. 3(a) (1989) (Appendix D-1).

2. "T" refers to the transcript of the pretrial, trial and sentencing proceedings in this case.

that he had "felt [crack cocaine] in clothing" approximately 50 to 75 times on prior occasions and "was absolutely sure that's what [was in Respondent's pocket], or [he] would have left it there." (T.5-6, 9-10). Respondent testified concerning the events leading up to the stop, but did not dispute Officer Rose's testimony concerning the feeling and seizing of the crack cocaine (T.28-33).

On March 6, 1992, the trial court made findings of fact and ruled that the investigative stop and search was proper. In its order denying the suppression motion, the trial court made the following conclusions of law:

1. Officer Rose had a reasonable suspicion based upon objective facts that [Respondent] was involved in criminal activity.

2. Officer Rose had additional reasonable grounds based upon objective facts to conduct the pat-down search for weapons in the alley.

3. Officer Rose seized the crack/cocaine based upon the feel and touch of the item located in [Respondent's] pocket and this seizure was reasonable.

(Appendix C-3). In its accompanying memorandum, the trial court noted that the seizure of the cocaine was justified under the "plain feel" exception which was "no different than plain view." (Appendix C-5).

Respondent requested that the case be submitted to the trial court on the basis of the testimony presented at the pretrial hearing and on certain stipulated facts. On May 9,

1990, the trial court deferred a finding of guilt[3] and placed Respondent on probation for two years.[4]

Respondent appealed his deferral of guilt to the Minnesota Court of Appeals. The court of appeals affirmed the stop and pat down search, but held that the seizure of the cocaine exceeded the constitutional parameters of *Terry v. Ohio*, 392 U.S. 1 (1968), and reversed the trial court's deferral of guilt. *See State v. Dickerson*, 469 N.W.2d 462, 464 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn. 1992) (Appendix B). The court of appeals held that "the scope of a pat search must be strictly limited to a search for weapons" and declined "to adopt the plain feel exception in Minnesota." *Dickerson*, 469 N.W.2d at 466 (Appendix B-9-10).

The Minnesota Supreme Court granted further review in this case.[5] On March 20, 1992, a unanimous supreme court held that the stop and pat down search was proper. *See State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (Appendix A-4-5). But, in a four-to-three decision, the

3. Under Minn. Stat. § 152.18, subd.1 (1989) a trial court may, without entering a judgment of guilty, place a person charged under the controlled substance laws on probation for a period of time. If the person successfully completes probation, the proceedings against the person are dismissed. A non-public record of the proceedings is maintained, however, so that courts may consider this record in future proceedings against the person (Appendix D-2-3).

4. On April 28, 1992, Respondent successfully completed probation and these proceedings were dismissed pursuant to Minn. Stat. § 152.18 (1989).

5. The State of Minnesota petitioned for further review. Contrary to what the Minnesota Supreme Court stated in its decision, *State v. Dickerson*, 481 N.W.2d 840, 842 (Minn. 1992) (Appendix A-2), Respondent did not file a cross appeal with the supreme court.

supreme court affirmed the court of appeals' ruling that the seizure of the crack cocaine violated the Fourth Amendment to the United States Constitution.[6] The majority opinion held that the seizure of the crack cocaine "in this case required a warrant, which police did not have." *Id.* (Appendix A-5). In so holding, the majority opinion stated the following:

> Because we do not believe the senses of sight and touch are equivalent, *we decline to extend the plain view doctrine to the sense of touch.* We reach this conclusion for two primary reasons. First, the sense of touch is inherently less immediate and less reliable than the sense of sight . . . . But even more important, the sense of touch is far more intrusive into the personal privacy that is at the core of the fourth amendment. It is one thing to see a bag of marijuana in a suspect's pocket . . . . It is quite something else to pinch, squeeze and rub the

6. The Minnesota Supreme Court's decision repeatedly refers to the Fourth Amendment as the basis of its decision. Since the search and seizure provision of the Minnesota Constitution is contained in Article I, § 10, it is clear that the supreme court based its decision in this case on the Fourth Amendment to the United States Constitution. The fact that the supreme court did not state or imply that its holding was based upon state constitutional provisions further supports the conclusion that this holding is based solely upon federal constitutional grounds. In *State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991), in contrast, when the Minnesota Supreme Court relied upon the Minnesota Constitution to invalidate statutory distinctions between crack cocaine and powder cocaine on the ground that it was racially discriminatory, it clearly enunciated that it was basing its decision on the state constitution rather than the federal constitution's Equal Protection Clause.

> suspect's pocket to see what might be inside. Observing something that is held out to plain view is not a search at all . . . . Physically touching a person cannot be considered anything but a search.
>
> * * *
>
> "[P]lain feel" is not a well-delineated exception to the fourth amendment. The Supreme Court never has recognized it and neither have we.

Id. at 845-46 (emphasis added) (Appendix A-8-9, A-11).[7]

The three-member dissent, written by Justice Coyne, stated that the majority's conclusion "that the 'crack' cocaine discovered in the pocket of the defendant's jacket is the inadmissible product of an unreasonable search and seizure represents a departure from common sense and common experience." *Id.* at 846 (Coyne, J., dissenting) (Appendix A-13). In response to the majority's rejection of the "plain feel" exception to the Fourth Amendment, the dissent stated:

> This simple act of feeling the outline and shape of the lump was permissible under *Terry*, and it appears from Rose's testimony that, because of his extensive experience in discovering crack cocaine while patting down previous suspects, he was "absolutely sure" that the substance was

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7. The majority opinion also rejected Officer Rose's testimony that he immediately knew that the object was crack cocaine, despite the fact that the trial court found this testimony to be credible and Respondent did not dispute this testimony. *See State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1991) (Appendix A-6).

> crack cocaine "before" he reached into the pocket and removed it.
>
> * * *
>
> [T]he officer did not violate [Respondent's] fourth amendment rights in discovering and seizing the crack cocaine . . . . *[A] policeman should not be compelled to ignore what his senses--whether sight, sound, smell, taste, or touch--tell him in clear and unmistakable language.*

Id. at 849, 851 (Coyne, J., dissenting) (emphasis added) (Appendix A-18-19, A-23-24).

REASONS FOR GRANTING THE WRIT

I. THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND WHICH REQUIRES A POLICE OFFICER TO DISREGARD CONTRABAND WHICH HE LEGITIMATELY DISCOVERS THROUGH HIS SENSES DURING A VALID *TERRY* SEARCH.

The question presented herein is whether the Fourth Amendment to the United States Constitution requires a police officer to ignore contraband discovered during the course of a legitimate *Terry* frisk simply because the officer learned of the contraband through the sense of touch rather than the sense of sight. In a four-to-three decision, the Minnesota Supreme Court held that it does and that any evidence obtained as a result of a warrantless seizure, where probable cause was obtained through the sense of touch, must be suppressed. The majority also held that, under these circumstances, the police were required to obtain a warrant before they could seize the crack cocaine. The logical corollary to the supreme court's majority holding is that during a *Terry* frisk, police may not seize an object even when they have probable cause to believe that the object is contraband or other evidence of a crime if probable cause is based upon any sense other than sight.

The holding by the majority of the Minnesota Supreme Court is an unduly rigid application of *Terry v. Ohio*, 392 U.S. 1 (1968), and conflicts directly with this Court's prior decisions. In rejecting a similar claim that

seizures during a *Terry* search should be limited to weapons, this Court stated the following:

> If, while conducting a legitimate *Terry* search . . . the officer should, as here, discover contraband other than weapons, *he clearly cannot be required to ignore the contraband*, and the Fourth Amendment does not require its suppression in such circumstances . . . .

Michigan v. Long, 463 U.S. 1032, 1050 (1983) (citations omitted; emphasis added).

The majority's holding in *Dickerson* that other senses are less reliable than sight and cannot constitute the basis for a warrantless probable cause seizure is in direct conflict with a long line of cases by this Court. *See* Larry E. Holtz, *The "Plain Touch" Corollary: A Natural and Foreseeable Consequence of the Plain View Doctrine*, 95 Dickinson L. Rev. 521, 533-37 (1991) [hereinafter Holtz, *"Plain Touch" Corollary*].

That probable cause can be based upon senses other than sight is evident from this Court's decision in *Texas v. Brown*, 460 U.S. 730 (1983). In *Brown*, a plurality of this Court affirmed the seizure of a balloon container observed by a police officer after he stopped the defendant at a routine driver's license checkpoint. The balloon contained controlled substances. In affirming the seizure, this Court stated that the plain view seizure doctrine "reflects the fact that requiring police to obtain a warrant once they have obtained a *first-hand perception* of contraband, stolen property, or incriminating evidence generally would be a 'needless inconvenience' . . . that might involve danger to the police and public." *Id.* at 739 (emphasis added). This Court's use of "perception" rather than "viewing" or

"seeing" strongly indicated that this Court was not limiting plain view merely to those items that can be seen. *See* Holtz, *"Plain Touch" Corollary*, at 532-33.

In several cases, this Court has recognized that probable cause can be determined through senses other than sight. In *Johnson v. United States*, 333 U.S. 10 (1948), this Court effectively recognized a "plain smell" corollary to the "plain view" doctrine. The defendant in *Johnson* had contended that that a narcotics officer's detection of the odor of burning opium from an adjacent room was an insufficient basis to justify the issuance of a search warrant. In rejecting this contention, this Court stated that detection of the presence of distinctive odors by one "qualified to know the odor" was a sufficient basis for a search warrant. *Id.* at 13; *see also United States v. Johns*, 469 U.S. 478, 482 (1985) (scent of marijuana from trucks provided officers with sufficient probable cause to believe trucks contained contraband).

This Court's decision in *Terry* "is perhaps the most logical forerunner of the plain touch corollary." Holtz, *"Plain Touch" Corollary*, at 534. In *Terry*, while conducting a protective pat down search, Officer McFadden did not place his hands in Terry's pockets until "he had felt" a weapon. *Terry*, 392 U.S. at 29-30. His determination that what he felt was a weapon was based upon his training and experience as a police officer. *See id.* at 5. Consequently, Officer McFadden's "feel" or touching of the item, coupled with his years of experience as a police officer, provided him with sufficient probable cause to believe it was a weapon and he was justified in seizing it without a warrant. *See id.* at 29-31.

The logical corollary to *Terry* is present in this case. Like Officer McFadden in *Terry*, Officer Rose was conducting a lawful pat down search when he felt the crack

cocaine. Also like Officer McFadden, Officer Rose testified that he was able to identify the seized object based upon his extensive experience as a police officer. The only difference between this case and *Terry* is that the item seized in this case was a controlled substance rather than a weapon. This difference, however, has no constitutional significance since this Court has previously ruled that the Fourth Amendment does not require police to ignore contraband when it is discovered during a legitimate *Terry* search. *Long*, 463 U.S. at 1050.

That seizure of a non-weapon should be permissible during a Terry search is supported by the following statement by Professor LaFave:

> Assuming the object discovered in the pat-down does not feel like a weapon, this only means that a further search may not be justified under a *Terry* analysis. *There remains the possibility that the feel of the object, together with other suspicious circumstances, will amount to probable cause that the object is contraband or some other item subject to seizure, in which case there may be a further search based upon that probable cause.*

Wayne LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.4(c) at 524 (2d ed. 1987) (emphasis added).

Finally, this Court's decision in *Arkansas v. Sanders*, 442 U.S. 753 (1979), *modified on other grounds by United States v. Ross*, 456 U.S. 798 (1982), supports the position that certain objects, despite the fact that they cannot be seen, are open to "plain view . . . because their contents can be inferred from their outward appearance." *Id.* at 764-

65 n.13. Here, the shape of the crack cocaine became known to Officer Rose through his legitimate touching of Respondent's pocket during a pat down search. The shape of the crack cocaine made its contents known to the officer and was, therefore, properly subject to seizure.

Officer Rose's act of feeling the outline and shape of the lump, and his decision to seize the item once he realized it was crack cocaine was permissible under this Court's prior decisions. His probable cause to believe that this item was crack cocaine was bolstered by the fact that Respondent had just exited a notorious crack house and had taken evasive action when he saw the police. The Minnesota Supreme Court's holding has resulted in the untenable position that, following a valid *Terry* search, a person who police have probable cause to believe possesses crack cocaine *is free to walk away with the crack cocaine if the probable cause is based upon the officer's sense of touch.* Such a broad view of the scope of the Fourth Amendment "represents a departure from common sense and common experience." *Dickerson,* 481 N.W.2d at 846 (Coyne, J., dissenting) (Appendix A-13). Review by this Court is necessary to correct the *Dickerson* majority's misinterpretation of the Fourth Amendment on this important federal question.

II. THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT NEEDS TO BE, DECIDED BY THIS COURT TO RESOLVE THE CONFLICT BETWEEN THE DECISION OF THE MINNESOTA SUPREME COURT AND THE DECISIONS OF OTHER STATE AND FEDERAL APPELLATE COURTS.

Numerous federal and state courts have addressed the issue of "plain feel" seizures arising out of investigative or other legitimate stops by police officers. All of the federal courts and a majority of the state courts ruling on this issue have held that probable cause for a seizure of an object may be based upon an officer's sense of touch. The Minnesota Supreme Court and several other state courts have adopted the opposite position. Review by this Court is necessary to resolve this conflict and to ensure that the Fourth Amendment is applied uniformly across the country.

Federal and State Courts that have Approved "Plain Feel" Seizures

Whether probable cause can be based upon the "feel" of an object has been directly addressed by the Second, Fourth, Eighth, Ninth, and District of Columbia Courts of Appeals. These federal circuit courts have unanimously held that a police officer may seize an object when the officer touches an item and, as a result of that touch, develops sufficient probable cause to believe that the object

is contraband or other evidence of a crime.[8] *See United States v. Salazar*, 945 F.2d 47, 51 (2d Cir. 1991), *cert. denied*, No. 91-7752, 1992 WL 68687 (U.S. May 18, 1992) (although the plain feel doctrine was not explicitly mentioned,[9] the court held that the feel of an item in a weapons pat down can provide probable cause to justify a warrantless search for narcotics on a suspect); *United States v. Buchannon*, 878 F.2d 1065, 1066-67 (8th Cir. 1989) (seizure of two plastic baggies of cocaine from defendant's pocket during pat down search for weapons; if not proper as a "plain view" case was proper as a "plain feel" case); *United States v. Williams*, 822 F.2d 1174, 1181-85 (D.C. Cir. 1987) (seizure of bag was justified under the plain touch doctrine when officer, who properly picked up bag, knew immediately from touching it that it contained baggies of heroin); *United States v. Norman*, 701 F.2d 295, 297-98 (4th Cir.), *cert. denied*, 464 U.S. 820 (1983) (coast guard officer's "opportunity to see, smell and even feel the bales" of marijuana was sufficient for the marijuana to be in "plain view"); *United States v. Portillo*, 633 F.2d 1313, 1316, 1320 (9th Cir. 1980), *cert. denied*, 450 U.S. 1043 (1981) (police seizure of gun and other evidence in bag was proper

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8. The Fifth Federal Circuit Court of Appeals has not directly ruled upon the "plain feel" doctrine, but its ruling in one case is consistent with this doctrine. In *United States v. Smith*, 649 F.2d 305, 309 (5th Cir. 1981), *cert. denied*, 460 U.S. 1068 (1983), the Fifth Circuit affirmed the seizure of cocaine when, during a consensual narcotics pat down search, the officer felt what appeared to be cocaine in a suspect's pocket, reached inside the pocket and removed the cocaine.

9. In an earlier decision, the Second Circuit Court of Appeals explicitly adopted the "'plain feel' version of the 'plain view' doctrine." *United States v. Ocampo*, 650 F.2d 421, 429 (2d Cir. 1981).

since "the contents of the paper bag were apparent from the outward feel of the container").

Two federal district courts have determined that probable cause for a warrantless seizure can be based upon the officer's feel of the object. *See United States v. Ceballos*, 719 F. Supp. 119, 122, 128 (E.D.N.Y. 1989) (seizure of narcotics proper as incident to arrest where officer developed probable cause to believe defendant possessed narcotics from touching bulge on defendant during a protective pat down search); *United States v. Pace*, 709 F. Supp. 948, 954-55 (C.D. Cal. 1989), *aff'd*, 893 F.2d 1103 (9th Cir. 1990) ("plain touch" exception justified seizure of cocaine bricks when officer immediately identified these objects as cocaine when he felt them during a consensual pat down search).[10]

Appellate courts in nine states have also held that an object is subject to seizure if, as a result of a lawful touching, an officer develops probable cause to determine that the object is contraband.[11] *See Jackson v. State*, 804

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10. Research has disclosed one case in which a federal district court has ruled that police are not allowed to seize an item from a suspect's pocket even though the officer believed that the lump in the pocket contained cocaine. *See United States v. Rodriquez*, 750 F. Supp. 1272 (W.D.N.C. 1990). This case, however, is distinguishable from the "plain feel" cases because the officer "saw" the lump in the suspect's pocket and did not "feel" it during a pat down search. The court apparently concluded that observation of "a small, inconspicuous bulge" was not a sufficient basis to believe that the lump was cocaine. *Id.* at 1275 n.1.

11. In the State of Hawaii, the Hawaii Intermediate Court of Appeals formally adopted the "plain feel" doctrine to justify the seizure of a gun, but the Hawaii Supreme Court affirmed the search on other grounds and found no need to reach the "plain feel" doctrine. *See State v. Ortiz*, 683 P.2d 822, 829 (Haw. 1984), *aff'g on other grounds*, 662 P.2d 517 (Haw. Ct. App. 1983).

S.W.2d 735, 737, 740 (Ark. Ct. App. 1991) (alternative basis for holding); *People v. Chavers,* 658 P.2d 96, 102 (Cal. 1983); *People v. Hughes,* 767 P.2d 1201, 1205-06 (Colo. 1989); *Doctor v. Florida,* 596 So. 2d 422, 444-46 (Fla. 1992) (held that seizure of an object during a pat search is proper if the officer develops probable cause during the stop and frisk, but found that initial stop in case was improper); *State v. Lee,* 520 So. 2d 1229, 1233 (La. Ct. App. 1988); *State v. Vanacker,* 759 S.W.2d 391, 393-94 (Mo. Ct. App. 1988); *State v. Vasquez,* 815 P.2d 659, 664 (N.M. Ct. App.), *cert. denied,* 815 P.2d 1178 (N.M. 1991) (recognized "plain touch" exception but did not find it applicable in the instant case); *Ruffin v. Commonwealth,* 409 S.E.2d 177, 179-80 (Va. Ct. App. 1991);[12] *State v. Richardson,* 456 N.W.2d 830, 836-39 (Wis. 1990).

In several of the jurisdictions where seizures based upon the sense of touch were affirmed, the facts surrounding the touching and seizure are virtually identical to the pat down and seizure in this case. *See, e.g., Salazar,* 945 F.2d at 48 (officer "squeezed the outside of the pocket and . . . felt the crackling of plastic"); *Ceballos,* 719 F. Supp. at 122 (officer "felt a large bulge" inside the suspect's jacket); *Pace,* 709 F. Supp. at 951 (officer felt two hard objects on the defendant's back that he identified through the "clothing as having the size and shape of two kilos of cocaine packaged in the form of 'bricks'"); *People v. Thurman,* 257 Cal. Rptr. 517, 521-22 (Cal. Ct. App.

12. In a later decision, the Virgina Supreme Court considered a similar case involving a seizure based upon an officer's feel of an item, but held that the seizure was improper because the officer only had a "hunch," not probable cause, to believe that the object was a controlled substance. *See Harris v. Commonwealth,* 400 S.E.2d, 191, 195-96 (Va. 1991).

1989) (believing that object was gun, officer stuck his hand inside jacket pocket, squeezed the object and realized it was "rock cocaine" in a baggie); *People v. Lee,* 240 Cal. Rptr. 32, 34, 37 (Cal. Ct. App. 1987) (officer patted chest area of defendant with a "gripping or 'claw type' motion" and "felt a clump of small resilient objects" that he believed were heroin-filled balloons); *Hughes,* 767 P.2d at 1203 (officer felt a "hard cylindrical object" and pulled out a film canister containing cocaine); *Doctor,* 596 So. 2d at 444-45 (officer who had felt crack cocaine over 800 times, felt plastic bag with "peanut brittle type feeling in it" which he "equated to the texture of rock cocaine"); *State v. Bearden,* 449 So. 2d 1109, 1116 (La. Ct. App. 1984), *writ denied,* 452 So. 2d 179 (La. 1984) (officers "felt an object, which was obviously not a weapon, but which could be *tactilely* identified as a large quantity of pills").

Several of the above-cited courts that have supported the "plain touch" exception, have also held that the seizure of the contraband was justified as part of a search incident to arrest. Under this alternate rationale, it is not unreasonable for the police to conduct the search and seizure of the object *before* a formal arrest where probable cause obtained from the touch of the object justified the arrest of the suspect. *See Ceballos,* 719 F. Supp. at 128; *Pace,* 709 F. Supp. at 956-57; *Jackson,* 804 S.W.2d at 740; *Thurman,* 257 Cal. Rpt. at 522; *Bearden,* 449 So. 2d at 1116.

State Courts that have Rejected the "Plain Feel" Exception

In addition to Minnesota, appellate courts in five other states have held that police are not entitled to seize an object during a pat down search even though, as a result of

their touching of the object, they have reasonably ascertained that the object is a controlled substance. *See McDaniel v. State*, 555 So. 2d 1145, 1147 (Ala. Crim. App. 1989), *cert. denied*, 111 S.Ct. 43 (1990); *State v. Collins*, 679 P.2d 80, 81-84 (Ariz. Ct. App. 1983); *State v. Rhodes*, 788 P.2d 1380, 1381 (Okl. Crim. App. 1990); *Commonwealth v. Marconi*, 597 A.2d 616, 621-24 (Pa. Super. Ct. 1991) (item not sufficiently distinguishable); *State v. Broadnax*, 654 P.2d 96, 101-03 (Wash. 1982).

State Courts that are Divided on the Constitutionality of the "Plain Feel" Exception

In two states, appellate courts are divided as to whether probable cause for a seizure during a *Terry* search can be based upon the sense of touch. *Compare Anderson v. State*, 553 A.2d 1296, 1300 (Md. Ct. Spec. App. 1989) (although holding that seizure of stolen property was improper, court indicated that it would have been permissible if the officer had "felt the contents of the pocket from outside" the clothing before he put his hand into the pocket) with *Alfred v. State*, 487 A.2d 1228, 1239-40 (Md. Ct. Spec. App. 1985) (police cannot seize objects they know are not weapons, even if their sense of touch has identified the objects as stolen property); *compare In re Marrhonda G.*, 575 N.Y.S.2d 425, 429-31 (Fam. Ct. 1991) (applied "plain touch" doctine to police touching of bag) *with In re James L.*, 519 N.Y.S.2d 675, 676 (App. Div. 1987) (police could not seize cocaine during weapons search even though they knew from patting the suspect's pocket that it contained cocaine).

Although the federal circuit courts of appeals have uniformly accepted the "plain feel" doctrine, there is great

disparity in the way the state courts have viewed the constitutionality of this doctrine. Evidence that would be admissible in federal courts is repeatedly being suppressed in state courts on federal constitutional grounds. Inconsistency both within the states and between the states has left the law on this federal question in confusion. This Court's review of the Minnesota Supreme Court's decision is necessary to clarify this important issue of federal constitutional law.

CONCLUSION

For the reasons discussed above, the State of Minnesota respectfully requests that this Court grant the petition for a writ of certiorari to review the judgment of the Minnesota Supreme Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF MINNESOTA
IN SUPREME COURT

C9-90-1780

Court of Appeals

Tomljanovich, J.

Concurring in part, Dissenting in part,
Coyne, Simonett, JJ. and Keith, C.J.

State of Minnesota, petitioner,
Respondent,

vs.

Timothy Eugene Dickerson,
Appellant,

Filed: March 20, 1992
Office of Appellate Courts

SYLLABUS

(1) There is no "plain feel" exception to the warrant requirement of the fourth amendment.

(2) When a police officer carrying out a *Terry*-style protective weapons search feels an object in a suspect's clothing that cannot possibly be a weapon, s/he is not privileged to pinch, squeeze, twist or otherwise manipulate the object to determine what it is.

Affirmed.

Considered and decided by the court en banc without oral argument.

OPINION

TOMLJANOVICH, Justice.

This case presents the question of whether a police officer executing a warrantless protective weapons search may seize an object from a detainee's pocket based on the officer's perception that although the object is not a weapon, it feels like contraband. The trial court held in the affirmative and the court of appeals reversed. *State v. Dickerson*, 469 N.W.2d 462 (1991). We affirm.

After a trial on essentially stipulated facts from the omnibus hearing, defendant was convicted in Hennepin County District Court of fifth degree possession of a controlled substance, crack cocaine. Police found the cocaine in the defendant's jacket pocket during a pat search for weapons. The trial court denied the defendant's motion to suppress the evidence, ruling that the stop was justified under *Terry v. Ohio*, 392 U.S. 1 (1968), and that seizure of the cocaine was justified under a "plain feel" exception to the fourth amendment warrant requirement. A unanimous court of appeals panel found the stop justified but reversed on the "plain feel" issue. The state appeals from that decision and the defendant cross appeals on the validity of the stop.

Shortly after 8 p.m. on November 9, 1989, two Minneapolis police officers were on patrol in a marked squad car in North Minneapolis. At 8:15 p.m., while driving southbound on Morgan Avenue North, the officers saw a man leaving a multi-unit apartment building. The man later was identified as the defendant. The officers were suspicious because one had executed search warrants at the building and had found drugs and weapons. He testified that he also had been called to the building to investigate complaints of drug sales in the hallways. The officer said the apartment building was known as a 24-hour-a-day crack house, and police were monitoring it, especially after receiving a complaint from the local alderman.

The officer testified that the defendant came down the stairs from the building and started to walk toward the street until he saw the squad car and made eye contact with the officer. The defendant then stopped, turned around, walked back three to five feet and took a sidewalk around the side of the house to the alley. The defendant testified that he never saw the police car on Morgan Avenue, never made eye contact with the officers and went directly from the apartment building to the sidewalk that leads to the alley. He said that he was on his way to a friend's house and the alley was the fastest route. The trial judge credited the officer's version and found that the defendant had turned abruptly after seeing police.

The officer testified that the defendant's change of direction made him suspicious, and he told his partner to pull the squad car into the alley, so he could "check [the defendant] for weapons and contraband." They drove into the alley, where the defendant was walking southbound. The officer, who never had seen the defendant before and knew of no criminal activity by him, confronted the defendant and ordered him to submit to a pat search.

The officer described the search as follows: "As I pat searched the front of his body, I felt a lump, a small lump in the front pocket [of the defendant's nylon jacket]. I examined it with my fingers and slid it and felt it to be a lump of crack cocaine in cellophane." The officer then reached into the defendant's jacket pocket and pulled out what proved to be .20 grams of crack cocaine in a knotted sandwich-wrap bag. The confiscated material was described as the size of a pea or a marble.

The Stop

Warrantless searches "are *per se* unreasonable under the fourth amendment -- subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). One such exception is the protective pat search for weapons. *Terry* holds that police may stop and frisk a person when (1) they have a reasonable, articulable suspicion that a suspect might be engaged in criminal activity and (2) the officer reasonably believes the suspect might be armed and dangerous. 392 U.S. at 30. If both of those factors are present, police may "conduct a carefully limited search of the outer clothing of such person[] in an attempt to discover weapons which might be used to assault him." *Id.*

We have held that one circumstance giving rise to reasonable suspicion is evasive conduct. *State v. Johnson*, 444 N.W.2d 824, 827 (Minn. 1989). As the court of appeals and the defendant correctly point out, merely being in a high-crime area will not justify a stop. *See Brown v. Texas*, 443 U.S. 47, 52 (1979). But defendant's evasive conduct after eye contact with police, combined with his departure from a building with a history of drug activity, justified police in reasonably suspecting criminal activity.

In this case, defendant denied making eye contact with the officer and denied making a sudden change in direction,

but the trial court, which had an opportunity to observe both the officer and defendant testify, credited the officer's testimony. We accord great deference to the trial court's determinations in this area. "The credibility of witnesses and the weight to be given their testimony are determinations to be made by the factfinder." *DeMars v. State*, 352 N.W.2d 13, 16 (Minn. 1984). We therefore agree with the trial court and the court of appeals that the stop was valid.

The Search

Because the stop was valid under *Terry*, police were justified in frisking the defendant if they reasonably suspected he could be armed and dangerous. In this case, the defendant's suspicious behavior, the history of drug activity in the immediate vicinity and Officer Rose's personal experience in seizing guns from the building the defendant left justified a pat search. The remaining issue is whether the search was "carefully limited" as *Terry* requires. The court of appeals held that police exceeded the scope of a *Terry* search. We agree and affirm.

While we give great deference to the trial court on factual determinations, that deference is not unlimited. The trial court's findings "will not be reversed upon review unless clearly erroneous or contrary to law." *State v. Gilbert*, 262 N.W.2d 334, 340 (Minn. 1977) (citations omitted). In evaluating the search in this case, the trial court made errors of fact and law, requiring a reversal of the defendant's conviction. When the correct law is applied to all of the facts, it is clear that the defendant's fourth amendment right to be free from unreasonable searches and seizures was violated. The pat search of the defendant went far beyond what is permissible under *Terry*. To conduct the type of search at issue in this case required a warrant, which police did not have. Therefore, the fruits of that

illegal search must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

The trial court and the dissenting justices of this court would allow the seized evidence to be admissible under a "plain feel" exception to the fourth amendment warrant requirement. Neither this court nor the United States Supreme Court ever has recognized such an exception and we decline to do so today.

The trial court found that when the officer felt the defendant's jacket pocket, he knew immediately he was feeling a plastic bag containing a lump of crack cocaine. The officer's "immediate" perception is especially remarkable because this lump weighed 0.2 grams and was no bigger than a marble. We are led to surmise that the officer's sense of touch must compare with that of the fabled princess who couldn't sleep when a pea was hidden beneath her pile of mattresses. But a close examination of the record reveals that like the precocious princess, the officer's "immediate" discovery in this case is fiction, not fact.

The officer testified that he was sure he had found crack cocaine only after (1) feeling a lump, (2) manipulating it with his fingers, and (3) sliding it within the defendant's pocket. That testimony belies any notion that he "immediately" knew what he had found. And this was not a case of some clever cross-examiner putting words in the officer's mouth; this was his own testimony on direct examination. Any doubts we might have about the trial court's findings are removed by another piece of information, also provided by the officer on direct examination. He testified that after observing the defendant engage in evasive behavior he directed his partner to stop the car so he could search the defendant for weapons and drugs.

It is true, as the dissent points out, that an improper motive does not invalidate an otherwise lawful search. *Horton v. California*, ___ U.S.___, 110 S.Ct. 2301, 2308-10 (1990). But the officer's testimony that he intended to conduct a warrantless search for drugs, combined with his testimony about squeezing, sliding and otherwise manipulating the contents of the defendant's pocket, convince us that he set out to flaunt the limitations of *Terry*, and he succeeded. The results of such a search cannot be admitted into evidence. *Terry* would be rendered meaningless if such conduct were allowed. If given long enough, most police officers, or civilians for that matter, could pinch and squeeze and twist and pull and rub and otherwise manipulate a suspect's jacket and figure out what is inside. But the fourth amendment doesn't permit that type of intrusive conduct without a warrant or probable cause to arrest, and police in this case had neither.

Terry permits a protective frisk for weapons. When the officer assures himself or herself that no weapon is present, the frisk is over. During the course of the frisk, if the officer feels an object that cannot possibly be a weapon, the officer is not privileged to poke around to determine what that object is; for purposes of a *Terry* analysis, it is enough that the object is not a weapon. *See State v. Alesso*, 328 N.W.2d 685, 688 (Minn. 1982); *State v. Bitterman*, 304 Minn. 481, 486, 232 N.W.2d 91, 95 (1975); *State v. Ludtke*, 306 N.W.2d 111 (Minn. 1981); 3 W. LaFave, *Search and Seizure* § 9.4(c) at 524 (2d ed. 1987).

The trial court held, and the dissent argues, that the officer's discovery should be admissible under a "plain feel" exception to the fourth amendment warrant requirement. The handful of courts that have applied a "plain feel" analysis have described it as an extension of the well-recognized "plain view" doctrine. *See State v.*

Washington, 396 N.W.2d 156, 161-62 (Wis. 1986); *United States v. Williams*, 822 F2d 1174 (D.C. Cir. 1987).[1]

Under plain view, if the sight of an object gives a police officer probable cause to believe the object is the fruit or instrumentality of a crime, it may be seized without a warrant, provided (1) police are legitimately in the position from which they view the object; (2) they have a lawful right of access to the object; and (3) the object's incriminating nature is immediately apparent. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Arizona v. Hicks*, 480 U.S. 321, 326 (1987); *Horton*, 110 S.Ct. at 2308.

Because we do not believe the senses of sight and touch are equivalent, we decline to extend the plain view doctrine to the sense of touch. We reach this conclusion for two primary reasons. First, the sense of touch is inherently less immediate and less reliable than the sense of sight. For an excellent analysis on this point, *see State v. Broadnax*, 654 P.2d 96, 102 (Wash. 1982). But even more important, the sense of touch is far more intrusive into the personal privacy that is at the core of the fourth amendment. It is one thing to see a bag of marijuana in a suspect's pocket, as occurred in *Ludtke*. It is quite something else to pinch, squeeze and rub the suspect's pocket to see what might be inside. Observing something that is held out to plain view is not a search at all. *Hicks*, 480 U.S. at 325. Physically

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1. Even if we recognized a "plain feel" exception, the search in this case would not qualify. The Circuit Court for the District of Columbia, in adopting "plain feel," anticipated the type of abuse that occurred in the present case, saying: "[A]n officer who satisfies himself while conducting a *Terry* check that no weapon is present in a container is not free to continue to manipulate it in an attempt to discern the contents." *Williams*, 822 F.2d at 1184.

touching a person cannot be considered anything but a search.

The dissent also argues that we already have tacitly adopted a "plain feel" rule in previous cases. We do not believe that is the proper interpretation of our reasoning in upholding warrantless searches in those cases. In *Bitterman*, the officer felt a hard, round object that he couldn't immediately rule out as a weapon, so he seized it, and it turned out to contain contraband. In *Alesso*, as the officer approached a stopped car, he saw the defendant quickly move his hand into a pocket. Fearing for his safety, the officer reached into the defendant's pocket and grabbed what proved to be a soft plastic bag containing contraband.

The distinction between those cases and the present one is obvious. In *Bitterman*, the officer felt a hard object that might or might not have been or contained a weapon. Under those circumstances, the law does not require him to wait until the bullets are flying to be sure. He may continue his frisk until his safety is assured. So long as his continued concern for his safety is reasonable, if the hard object turns out to be or contain contraband, that item may legitimately be seized. Likewise, the officer in *Alesso* acted reasonably in heading off any possibility the suspect was drawing a weapon. He instinctively reached for the source of the threat and removed it, only to discover it was a soft bag containing contraband. This court held that under those circumstances, where the suspect made a seemingly aggressive move, the officer was justified in protecting himself by grabbing whatever it was the suspect was trying to reach. The law does not require an officer to carefully feel the item s/he is grabbing when s/he reasonably believes s/he might be in danger.

That is where the present case differs from *Alesso* and *Bitterman.* There was never any possibility that the object in the defendant's pocket was a weapon, and there was no justification for grabbing it as a matter of self-protection because the defendant never made an aggressive move. With *Bitterman* and *Alesso* not applicable, the dissent relies on *Ludtke* for the proposition that there are circumstances in which it is proper for police to seize an item during a frisk, even if it could not be a weapon and the suspect does not act aggressively. *Ludtke* shows that such circumstances can exist, but it does not change the fact that those circumstances do not exist in this case. During a pat search in *Ludtke,* the officer came across a plastic bag on Ludtke's person and seized it. It later proved to contain 11 grams of cocaine, 55 times the amount at issue in this case. This court said because the officer had seen a small bag of marijuana in Ludtke's pocket, he was justified in seizing the larger bag. The court never said why, but when the gap in the analysis is filled, it becomes clear why *Ludtke* is inapplicable to the present case.

As *Katz* points out, warrantless searches and seizures are automatically invalid unless they fall under a recognized exception. Two exceptions are applicable here: (1) the protective weapons frisk in *Terry* and (2) a search incident to arrest. *See Chimel v. California,* 395 U.S. 752, 763 (1969). Professor LaFave cites *Ludtke* for the proposition that although finding a soft object will terminate the officer's right to continue a pat search, the item may be subject to seizure on other grounds. 3 W. LaFave, *Search and Seizure* § 9.4(c) at 524 (2d ed. 1987).

The *Ludtke* court did not specify what those grounds were, but to be valid under *Katz* the other grounds have to be among the well-delineated exceptions to the fourth amendment. The *Ludtke* court acknowledged that soft

objects cannot be seized under the rationale of a *Terry* protective search. And contrary to the dissent's assertion, *Ludtke* should not be viewed as a "plain feel" case. First, "plain feel" is not a well-delineated exception to the fourth amendment. The Supreme Court never has recognized it and neither have we. Second, there is nothing in *Ludtke*'s facts to suggest that the officer discerned any texture that indicated to him what the bag contained. He knew he had come across a plastic bag but he never suggested he could tell what was inside it by its feel.

The best explanation for *Ludtke* is that based on all the circumstances, the seizure of the soft bag was justified because it occurred during a search incident to arrest. Before the frisk, the officer had seen a bag of marijuana in Ludtke's pocket. He also had found marijuana during a search of Ludtke's companion. He also observed Ludtke reaching furtively into the back seat of the car. Then the frisk of Ludtke revealed a knife. All of those circumstances, plus the presence of a plastic bag containing *anything* on Ludtke's body gave police probable cause to believe that Ludtke was in possession of a controlled substance, justifying a full search.

The present case is clearly distinguishable. Here, there was no visual sighting of contraband, no presence of a knife, no effort by the defendant to hide anything and no accomplice in possession of contraband. In short, there was nothing about the defendant or his conduct that would give the police probable cause to arrest him and justify the extensive search that was performed. Even accepting the State's version of the facts, all the police had, as a matter of law, was *Terry*-type reasonable suspicion. That entitled the officer to stop the suspect and, based on a reasonable suspicion that he might be armed, conduct a carefully limited frisk for weapons.

Once it was apparent that the defendant had no weapon, *Terry* ceased to legitimize the officer's conduct. Any further intrusion into the defendant's privacy required a warrant or probable cause to arrest, and the officer had neither. Instead, he continued feeling the defendant's person until he found what he was looking for all along. That type of warrantless search is not permissible under the fourth amendment and its fruits must be suppressed.

The dissent notes that "law enforcement is not a game in which liberty triumphs whenever a policeman is defeated." We agree, but we are equally certain that liberty does triumph when the vitality of the fourth amendment is reaffirmed and an individual's basic right to be free from unreasonable searches and seizures is vindicated.

Affirmed.

COYNE, Justice (concurring in part, dissenting in part).

Because it seems to me that concluding that the "crack" cocaine discovered in the pocket of the defendant's jacket is the inadmissible product of an unreasonable search and seizure represents a departure from common sense and common experience, I respectfully dissent from that part of the decision which holds the trial court erred in admitting the contraband into evidence.

Officer Vernon Rose, the testifying police officer whose credibility as a witness the majority rather cavalierly questions, was in 1989 a 14-year veteran of the Minneapolis Police Department, with 11-1/2 of those years spent on the north side, and he had recently had extensive experience working on cases involving narcotics and weapons. At 8:15 p.m. on November 9, 1989, Rose and his partner, in a marked squad car, approached a notorious "crack house" in north Minneapolis. The building in question is a three-story 12-unit apartment building; it is not clear from the record how many of the units were then occupied. What is clear is that the building had become known, as Rose put it in his testimony at the pretrial suppression hearing, as a "crack house" that "goes 24 hours a day," a building which had been the subject of much complaint from the community, including "aldermanic complaint," and which had been raided by police on "numerous" occasions, with drugs and weapons (including knives, handguns and sawed-off shotguns) being seized.

Rose testified that as the squad car approached the crack house, he saw defendant emerge from the front entrance and walk toward the front sidewalk. When defendant looked up and made eye contact with the officer, defendant made an "abrupt * * * strange and suspicious" change in direction, apparently "just because he was a police car." As defendant headed toward the alley instead

of toward the street, the officers drove into the alley and stopped him. While subjecting defendant to a pat-down search of the outer clothing, here a thin nylon jacket, Rose felt a lump in defendant's jacket pocket. With the clothing still between his hands and the object, Rose "examined it with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane." Rose had "felt [crack] before in clothing" -- approximately 50 to 75 times -- and "was absolutely sure that's what it was, or I would have left it there."

Up to that point Rose had been "just patting the outside." However, upon detecting the presence of the lump which he was certain was crack cocaine, he reached into the pocket and seized the substance, which indeed was crack cocaine (.20 grams), and arrested defendant. This prosecution followed.

Defendant moved to suppress the crack cocaine, challenging the basis for the stop and for the pat-down search for weapons, contending that Rose impermissibly used the pat-down search for weapons as an excuse for contraband, and claiming, finally, that the "plain view" seizure doctrine does not allow seizure of drugs or other contraband felt during a pat-down search for weapons. The trial court rejected each of these arguments. It determined that there was objective reasonable suspicion justifying the stop, that Rose was justified in conducting a pat-down search for weapons, and that Rose was justified in reaching into the pocket of defendant's jacket and seizing the crack cocaine after properly identifying it by feel during the pat-down search.

The majority, as a prelude to explaining why it agrees with the court of appeals that suppression is required, accepts the trial court's conclusions that the officers were justified in stopping defendant and that Rose was justified in

conducting a pat-down search for weapons. I agree with both of these ultimate conclusions but offer a more detailed and somewhat different analysis of these issues to lay the ground work for my examination of the issue on which I formally dissent.

In *State v. Johnson*, 444 N.W.2d 824 (Minn. 1989), we upheld a stop based upon a suspicious evasive act of driving: a person made a quick turn off the highway seconds after spotting a state trooper, then resumed driving on the highway within the next minute. We said, "While defendant's behavior may have been consistent with innocent behavior, it also reasonably caused the officer to suspect that defendant was deliberately trying to evade him." 444 N.W.2d at 827. Concluding that the officer had a "particular and objective basis for suspecting * * * criminal activity," we upheld the stop. *Id.*

Here Officer Rose saw not just an obviously evasive act by defendant but an obviously evasive act seconds after defendant left a notorious crack house and immediately on making eye contact with the officers, who were in a marked squad car. The stop was therefore clearly proper under *Johnson.*

In *Terry v. Ohio*, 392 U.S. 1, 23-27 (1968), the United States Supreme Court held, for the first time, that a police officer making an investigative stop may make a pat-down search of the suspect for weapons if the officer has a sufficient objective basis to believe that a pat-down search or frisk is necessary for self-protection. "[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* at 27 (citation omitted).

This court has consistently followed the lead of the United States Supreme Court. For example, in *State v. Bitterman*, 304 Minn. 481, 232 N.W.2d 91 (1975), police patted down the defendant when he arrived at a residential heroin outlet which was then being searched by police pursuant to a search warrant. We upheld the limited search because of the fact that the defendant was a known user of heroin, a very dangerous drug, the fact that the defendant walked in on the police when they were searching the apartment for heroin, the fact that other known users were present, and the testimony of the officer, who had made approximately 3,000 narcotic arrests, that it was common for narcotics users to carry weapons. Similarly, in *State v. Payne*, 406 N.W.2d 511, 513 (Minn. 1987), while upholding the pat-down search of the defendant and two others stopped at 3:00 a.m. in a high crime area for investigation of their involvement in an attempted break-in of a nearby residence moments earlier, we quoted Professor LaFave's statement that courts have been inclined to view the right to pat-down as automatic "whenever the suspect has been stopped * * * [for] a type of crime for which the offender would likely be armed * * * [including] such suspected offenses as robbery, burglary, rape, assault with weapons, homicide, and dealing in large quantities of narcotics." 406 N.W.2d at 513 (quoting 3 W. LaFave, *Search and Seizure* § 9.4(a) at 506 (1987)).

Ultimately the resolution of the question of the sufficiency of the basis for a protective pat-down search depends on the facts and circumstances of each individual case. The test, as I have already indicated, is an objective test which looks only at whether there was an objective basis for a limited search, not into the officer's motivation. As we put it in *State v. Pleas*, 329 N.W.2d 329, 332 (Minn. 1983):

> Under the 'objective theory' of probable cause which the United States Supreme Court has adopted, a search must be upheld, * * * if there was a valid ground for the search, even if the officers conducting the search based the search on the wrong ground or had an improper motive. *See Scott v. United States*, 436 U.S. 128, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978), discussed in 1 W. LaFave, *Search and Seizure* § 1.2(g) (Supp. 1982), and relied upon by this court in a number of cases, including *State v. Ludtke*, 306 N.W.2d 111 (Minn. 1981), and *State v. Veigel*, 304 N.W.2d 900 (Minn. 1981). *The same rule applies to police investigatory practices short of arrest or search.*

(Emphasis added). Thus, the fact that Officer Rose candidly admitted that he hoped to find drugs in the pat-down search does not answer the question whether or not the search was justified. Instead, justification must be found in objective facts existing at the time of the search and articulated by the officer at the suppression hearing.

Here, although there was no objective basis for suspicion that defendant was dealing in large quantities of narcotics, Officer Rose was justified in suspecting that defendant was at least in possession of or using crack cocaine based on his observation of defendant's conduct -- leaving a notorious crack house and abruptly turning and walking in the other direction upon seeing the officers in the marked squad car. The officer's reasonable suspicion that defendant was a crack user, together with the other circumstances -- the fact that weapons had often been found during the several raids on the house, the fact the area was a high crime area, the fact defendant had acted in a furtive

manner, and the fact the stop occurred in a dark alley -- satisfy me that the trial court did not err in concluding that the officer was objectively justified in patting down defendant for weapons.

In his testimony Officer Rose said that while patting down defendant's outer clothing, a thin nylon jacket, he felt a lump in the pocket. With the clothing still between his hands and the object, Rose "examined it with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane." The majority concludes that by examining the lump in this fashion Rose somehow exceeded the permissible scope of a lawful pat-down search for weapons. The case law, however, supports my conclusion that the limited search was not excessive in scope, or more precisely, not too intrusive. Once again, a resort to *Terry v. Ohio*, 392 U.S. 1 (1968), is in order. There Chief Justice Warren made clear the bright line dividing a limited pat-down search or frisk from a more intrusive full search of the person. A pat-down search or frisk is, as the Court put it, a "*careful* exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons * * * *." *Id.* at 16 (emphasis added). As the Court made clear in the companion case of *Sibron v. New York*, 392 U.S. 40, 65 (1968), if an officer invades the suspect's clothing and puts his or her hands into the suspect's pockets or otherwise reaches inside the outer clothing in order to examine an object, the search is no longer the limited search approved in *Terry*. As I said, Officer Rose testified here that he "examined [the lump] with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane." This simple act of feeling the outline and shape of the lump was permissible under *Terry*, and it appears from Rose's testimony that, because of his extensive experience in discovering crack cocaine while

patting down previous suspects, he was "absolutely sure" that the substance was crack cocaine "before" he reached into the pocket and removed it. The trial court, as factfinder, credited Rose's testimony, expressly finding that Rose felt the crack cocaine as part of the pat-down search for weapons and that "[b]ased upon his training and experience, Officer Rose formed the opinion that the object in defendant's pocket was crack/cocaine and removed it."

The majority makes light of Rose's testimony on this point, comparing the officer to the fabled princess who felt the pea placed under a stack of mattresses. Although the majority then goes on to make it clear that its skepticism concerning Rose's credibility on this point is irrelevant to its ultimate conclusions, I believe that, in fairness to Officer Rose, the characterization of his testimony as fiction ought not to go unchallenged. Officer Rose was not trying to feel something hidden under a stack of mattresses; he was patting down a thin nylon jacket. Furthermore, as we have observed time and again, trained, experienced, intelligent police officers often detect and perceive criminal acts that might elude the rest of us. In any event, the trial court, the appropriate factfinder in our system, had the opportunity to observe the demeanor of Officer Rose and expressly credited his testimony on this point. In short, the finder of fact found the testimony to relate fact not fiction, and I can find no basis for rejecting the trial court's determination of credibility.

In order to seize an object without a warrant pursuant to the "plain view" seizure doctrine, the officer must be acting lawfully when he or she discovers the object. Further, it must be "immediately apparent" to the officer that the object is contraband, incriminating evidence or something else of a seizable nature -- *i.e.*, the officer must have probable cause to believe the object is contraband or

some other item subject to seizure. *Horton v. California*, 110 S.Ct. 2301, 2308 (1990).[1] The discovery of the object need not be "inadvertent." *Id.* at 2308-10. "The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement." *Id.* at 2309. Thus, the fact that Officer Rose was looking for or hoping or expecting to find crack cocaine during the pat-down search for weapons does not invalidate its seizure.

Defendant contends, however, and the majority of this court so holds, that since the crack cocaine was discovered by the sensation of touch during a pat-down search rather than by the sensation of sight -- that is, by "plain feel" instead of "plain sight" -- it was unjustified. In fact, despite the majority's reluctance to admit it, we have relied on the plain view seizure doctrine in a number of cases to uphold police conduct similar to that of Officer

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1. *Arizona v. Hicks*, 480 U.S.321 (1987), cited by the majority, is not on point. There the police, after coming upon a stereo in plain view during the course of a search of an apartment, picked up the stereo in order to check the serial number and see if the stereo was stolen. The United States Supreme Court held that this movement of the stereo in order to view the serial number amounted to a seizure of the object and that absent probable cause this seizure was unjustified under the "plain view" seizure exception -- *i.e.*, that the police could not seize the object in order to find probable cause for the seizure. The majority in this case argues that by feeling the shape and outline of the lump, Officer Rose exceeded the proper scope of a pat-down search without probable cause. I believe that the United States Supreme Court will continue to rely on the bright line of *Terry* as to the scope and degree of intrusion permitted in a pat-down search for weapons and will not rely on *Hicks* in an attempt to modify the *Terry* rule.

Rose. The leading such case is *State v. Ludtke*, 306 N.W.2d 111 (Minn. 1981). A trooper stopped a car in which Ludtke was the passenger. When the driver could not produce identification papers, the trooper began to question Ludtke pursuant to standard procedures to verify the identification of the driver. While talking with Ludtke, the officer spotted a bag of marijuana sticking out of his shirt pocket. He seized this, then subjected the driver to a pat-down search for weapons and found more marijuana on him. He then subjected Ludtke to a pat-down search for weapons and found more marijuana on him. He then subjected Ludtke to a pat-down search for weapons and found a knife and a bag of cocaine. With respect to the pat-down search of Ludtke and the seizure of the bag of cocaine, we said:

> We need not decide in this case whether the frisk of defendant's person could be justified on the ground that the officer had probable cause to believe he would find more drugs on defendant's person. In this case, the frisk was clearly justifiable as a limited protective weapons search, * * *. *While the plastic bag of powder was soft and presumably did not feel like a weapon through the clothing, [the officer] was justified in reaching in and seizing it because he had already found a plastic bag of marijuana in the other shirt pocket and therefore could assume that this packet which he had felt also contained drugs.* After he removed the packet and saw that it indeed was suspected cocaine, he certainly was justified in seizing it and arresting defendant.

Id. at 113 (citations omitted) (emphasis added).[2]

The rule that emerges from *Ludtke* and similar cases is (a) if while patting down a suspect for weapons the officer feels an object and concludes that it is not a weapon, the officer *generally* may not reach in and remove the object but (b) if because of the feel of the object and other circumstances it is immediately apparent that the object, although not a weapon, is contraband, then the officer may seize it pursuant to the plain view seizure doctrine.

Professor LaFave cites *Ludtke* as the main authority for the following statement supporting the officer's conduct in this case:

> Assuming the object discovered in the pat-down does not feel like a weapon, this only means that a further search may not be justified under a *Terry* analysis. *There remains the possibility that the feel of the object together with other suspicious circumstances, will amount to probable cause that the object is contraband or some other item subject to seizure, in which case there may be a further search based upon that probable case.*

3 W. LaFave, *Search and Seizure* § 9.4(c) at 524 (2d ed. 1987) (emphasis added).[3]

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2. *See also State v. Gobely*, 366 N.W.2d 600, 602-03 (Minn.), *cert. denied*, 474 U.S. 922 (1985); *State v. Alesso*, 328 N.W.2d 685, 689 (Minn. 1982); *State v. Cavegn*, 294 N.W.2d 717, 722 (Minn.), *cert. denied*, 449 U.S. 1017 (1980).

3. The majority states: "Professor LaFave cites *Ludtke* for the proposition that although finding a soft object will terminate the officer's right to continue a pat search, the item may be subject to seizure on other grounds." The quote from the treatise in the text of this dissent more accurately presents Professor LaFave's approving analysis of *Ludtke*.

Other courts have reached the same conclusion. *See, e.g., United States v. Buchannon*, 878 F.2d 1065, 1066-67 (8th Cir. 1989) (upholding "plain feel" seizure), and *State v. Washington*, 396 N.W.2d 156, 161-62 (Wis. 1986) (holding that plain view rule is not limited to seizure of items discovered in plain view but also includes items discovered through the use of other senses, including touch, and holding further that "[t]hough a pat-down provides no justification to search for evidence of a crime, it does not mean that the police must ignore evidence of a crime which is * * * discovered" during pat-down).

My opinion in this case is also supported fully by the decisions of the United States Supreme Court. For example, the Court has said that if, while conducting a so-called *Terry* "frisk" (protective weapons search) of an automobile, the officer "should, * * * discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances." *Michigan v. Long*, 463 U.S. 1032, 1050 (1983) (citations omitted). *See also Texas v. Brown*, 460 U.S.730, 739 (1983), stating that plain view seizure doctrine "reflects the fact that requiring police to obtain a warrant once they have obtained *a first-hand perception* of contraband, stolen property, or incriminating evidence generally would be a 'needless inconvenience,'" * * *. (Emphasis added). (Citation omitted).

In summary, the officer did not violate defendant's fourth amendment rights in discovering and seizing the crack cocaine. The objective facts articulated by the officer at the pretrial suppression hearing justify not only the stop-to-investigate but also the protective pat-down search for weapons. As the trial court determined, the officer felt the crack cocaine during a properly conducted limited search

and, given the feel of the object and all the relevant surrounding circumstances, had probable cause to believe that the object was seizable contraband. Pursuant to decisional authority of both the United States Supreme Court and this court, that first-hand perception justified reaching into the pocket of defendant's jacket, seizing the object, and arresting defendant for illegal possession of a controlled substance.

It is well to remind ourselves occasionally that "[l]aw enforcement is not a game in which liberty triumphs whenever the policeman is defeated." E. Barrett, *Exclusion of Evidence Obtained by Illegal Searches -- A Comment on People v. Cahan*, 43 Calif L. Rev. 565, 582 (1955). Certainly, evidence obtained as the result of any unreasonable search or seizure should be excluded. But a policeman should not be compelled to ignore what his senses -- whether sight, sound, smell, taste, or touch -- tell him in clear and unmistakable language.

KEITH, Chief Justice (dissenting).
I join Justice Coyne's dissent.
SIMONETT, Justice (dissenting).
I join Justice Coyne's dissent.

APPENDIX B

STATE OF MINNESOTA
IN COURT OF APPEALS

C9-90-1780

Hennepin County Amundson, Judge

Filed: April 30, 1991
Office of Appellate Courts

STATE OF MINNESOTA,
Respondent,

Hubert H. Humphrey, III
Attorney General
200 Ford Building
117 University Avenue
St. Paul, MN 55155

Michael Freeman
Hennepin County Attorney
Beverly J. Wolfe
Assistant County Attorney
C-2000 Government Center
Minneapolis, MN 55487

vs.

TIMOTHY E. DICKERSON,

Appellant.

William Kennedy
Hennepin County Public
Defender
Peter W. Gorman
Assistant Public Defender
317 Second Avenue South
#200
Minneapolis, MN 55401

SYLLABUS

1. An investigatory stop and pat search require specific articulable facts which reasonably warrant an officer's belief a crime is being or has been committed.

2. Absent probable cause to arrest, an officer may exceed the scope of a limited pat search only for the purpose of recovering an object thought to be a weapon.

Reversed.

Considered and decided by Schumacher, Presiding Judge, Amundson, Judge, and Mulally, Judge.*

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* Retired judge of the district court, acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 2.

OPINION

Appellant Timothy Dickerson was charged with possession of a controlled substance in the fifth degree. He challenged the admission of the crack cocaine seized by a police officer. After an evidentiary hearing, the trial court held the stop and search of appellant was justified. The trial court also held seizure of the crack was valid based on the plain feel exception to the warrant requirement. We reverse.

FACTS

On November 9, 1989, at approximately 8:15 p.m., Minneapolis police officers Vernon D. Rose and Bruce S. Johnson were patrolling the 1000 block of Morgan Avenue North in a marked patrol car. Rose is a 14-year police veteran and has participated in approximately 75 drug search warrant executions and 50-75 drug-related arrests. Rose described the 12-unit apartment building at 1030 Morgan Avenue North as a "known crack house." He previously executed several drug-related search warrants at the address. Drugs, guns, and knives were seized during the searches.

Rose saw appellant Timothy Dickerson leaving the Morgan Avenue apartment building. Rose neither recognized Dickerson nor identified which apartment Dickerson left. According to Rose, Dickerson walked down the stairs and continued toward the sidewalk. Dickerson then made eye contact with Rose, immediately turned around, and began walking toward a side alley. Rose described Dickerson's movement as "abrupt".

Rose decided to stop Dickerson based upon his knowledge of past activities at the Morgan Avenue apartments and Dickerson's abrupt direction change. Rose admitted he did not suspect Dickerson of criminal activity before Dickerson's direction change.

The officers pulled into the alley and stopped Dickerson. Dickerson made no evasive movements and did not attempt to conceal anything. Rose did not notice any suspicious bulges in Dickerson's clothing. Dickerson, in contrast, testified he left the building and turned immediately toward the sidewalk leading to an alley. He denied making eye contact with Rose or making an abrupt direction change. Dickerson indicated he did not see the squad car until it drove toward him in the alley.

After stopping Dickerson, Rose performed a pat search. He testified he searched Dickerson because other weapons had been seized from people at the Morgan Avenue apartments. He also indicated that in his experience, drug traffickers often possess weapons.

During the pat search, Rose felt a small lump in the front pocket of Dickerson's nylon jacket. He examined the lump through the nylon with his fingers. Later he claimed that based upon his experience he knew immediately the lump was crack cocaine tied in cellophane wrap. He seized the crack cocaine and arrested Dickerson. Rose never thought the lump was a weapon.

The trial court concluded Dickerson's departure from a "known crack house" and his evasive conduct provided reasonable suspicion he was engaged in criminal activity. The trial court also found the police officer's pat search was justified based upon prior seizure of weapons in the area and Dickerson's conduct. Finally, the trial court held the crack seizure valid based upon a "plain feel" exception to the warrant requirement.

ISSUES

1. Was the stop justified?
2. Did the police have an articulable factual basis to believe Dickerson may have been armed and dangerous?

3. May the state justify the seizure under a "plain feel" exception to the warrant requirement?
4. May the state justify the seizure based upon a search incident to arrest theory not presented to the trial court?

ANALYSIS

I.

Whether the stop in this case was valid is purely a legal determination on given facts. Hence we analyze the testimony of the officer and determine whether his observations provided an adequate basis for the stop. *Berge v. Commissioner of Pub. Safety*, 374 N.W.2d 730, 732 (Minn. 1985).

Dickerson contends the police performed an unconstitutional investigative stop. The state argues the police properly stopped Dickerson pursuant to *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968). The trial court upheld the stop's validity.

The fourth amendment protects the peoples' right against unreasonable searches and seizures. U.S. Const. amend. IV. Seizures conducted without a warrant are per se unreasonable unless one of the exceptions to the warrant requirement is applicable. *See United States v. Place*, 462 U.S. 696, 701, 103 S. Ct. 2637, 2641 (1983).

One exception to the general warrant rule permits officers to stop and frisk an individual "for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." *Terry*, 392 U.S. at 22, 88 S. Ct. at 1880. Both parties agree a fourth amendment seizure occurred, but dispute the stop's validity under *Terry*.

An investigatory stop and frisk may be performed when law enforcement officers have a reasonable suspicion criminal activity "may be afoot." *Id.* at 30, 88 S. Ct. at

1884. Reasonable suspicion requires "specific articulable facts which, taken with rational inference from those facts, reasonably warrant" the belief a crime is being or has been committed. *Id.* at 21, 88 S. Ct. at 1879-80. An officer's suspicion must be evaluated "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *United States v. Cortez*, 449 U.S. 411, 419, 101 S. Ct. 690, 696 (1981). A trained police officer is entitled to draw inferences on the basis of "all of the circumstances *** inferences and deductions that might well elude an untrained person." *State v. Johnson*, 444 N.W.2d 824, 826 (Minn. 1989) (quoting *Cortez*, 449 U.S. at 418, 101 S. Ct. at 695).

We conclude Dickerson's stop was justified. First, evasive conduct alone has been held to justify an investigative stop. *Johnson*, 444 N.W.2d at 826-27. Dickerson's abrupt turn around after making eye contact with Rose plainly indicates evasive behavior. Further, Rose had personal knowledge of significant drug activity in the hallways of the Morgan Avenue apartment complex. Moreover, the stop was not based solely on Dickerson's presence in a high crime area. *See Brown v. Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 2641 (1979). Under these circumstances, the trial court did not err in concluding the stop was constitutionally justified.

II.

An officer may conduct a pat search of a lawfully stopped person if the officer has an objective, articulable basis for thinking the person may be armed and dangerous. *Wold v. State*, 430 N.W.2d 171, 175 (Minn. 1988). However, if the true goal of the search is discovery or preservation of contraband rather than weapons, the intrusion is not authorized. *See United States v. Gonzalez*, 763 F.2d 1127, 1130 n.1 (10th Cir. 1985). Our inquiry

therefore is whether Rose possessed a reasonable belief based on specific and articulable facts that Dickerson was dangerous and might gain immediate control of a weapon.

We conclude Rose had an articulable objective basis to perform a limited pat search. Rose previously seized drugs and weapons from the Morgan Avenue apartments. Rose also testified from experience that drug possessors often carry weapons. Dickerson's departure from a "known crack house," his evasive conduct, and Rose's experience with weapon-carrying drug traffickers provided specific and articulable facts to justify the pat search.

We conclude, however, the scope of the pat search exceeded constitutional parameters. The *Terry* analysis includes the principle that "a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry*, 392 U.S. at 17-18, 88 S. Ct. at 1878. A search's scope must be strictly tied to and justified by the circumstances which rendered its initiation permissible. *Id.* at 19, 88 S. Ct. at 1878.

Terry described the rationale and scope of a pat search:

> The sole justification of the search * * * is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

Id. at 29, 88 S. Ct. at 1884. *Terry* upheld the search before it, but carefully noted that the officer:

> confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a

general exploratory search for whatever evidence of criminal activity he might find.

Id. at 30, 88 S. Ct. at 1884.

In a companion case to *Terry*, the Supreme Court reversed a heroin possession conviction and emphasized the limited scope of a pat search. The Court noted:

> The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception--the protection of the officer by disarming a potentially dangerous man. Such a search violates the guaranty of the Fourth Amendment, which protects the sanctity of the person against unreasonable intrusions on the part of all government agents.

Sibron v. New York, 392 U.S. 40, 65-66, 88 S. Ct. 1889, 1904 (1968).

We read *Terry* and *Sibron* as limiting pat searches to a careful exploration of the outer surfaces of the person's clothing until and unless the officer discovers specific and articulable facts reasonably supporting the suspicion that the defendant is armed and dangerous. Absent probable cause to arrest, the officer may exceed the scope of a limited pat search and reach into the suspect's clothing only for the purpose of recovering an object thought to be a weapon.

The Minnesota Supreme Court has also emphasized the limited scope of a pat search.

> In a typical pat-down frisk, only certain "tactile sensations produced by the pat-down will justify a further intrusion into the clothing" to seize the object and the "better view" is that "a search is

> not permissible when the object felt is soft in nature."

State v. Alesso, 328 N.W.2d 685, 688 (Minn. 1982) (quoting 3 W. LaFave, *Search and Seizure*, § 9.4(c) at 130 (1978); *e.g.*, *State v. Bitterman*, 304 Minn. 481, 486, 232 N.W.2d 91, 94 (1975) (seizure of prescription bottle, which was a hard object that, when felt through the clothes, the officer thought might be a weapon was justified); *State v. Gannaway*, 291 Minn. 391, 394, 191 N.W.2d 555, 557 (1971) (pipe reasonably thought to be a weapon). *Accord State v. Collins*, 139 Ariz. 434, 438, 679 P.2d 80, 84 (Ariz. App. 1983) (officer may seize only weapons during "stop and frisk" weapons search, not any and all suspicious items discovered); *People v. Collins*, 1 Cal. 3d 658, 664, 83 Cal. Rptr. 179, 182, 463 P.2d 403, 406 (1970) (officer exceeded scope of pat down weapon search where no articulable facts indicated suspect was armed with an atypical weapon similar to the object felt); *People v. McCarty*, 11 Ill. App. 3d 421, 422, 296 N.E.2d 862, 863 (1973) (officer had no right to remove a soft plastic bag from defendant's coat pocket, after determining pocket did not contain a weapon); *State v. Rhodes*, 788 P.2d 1380, 1381 (Okla. Crim. App. 1990) (officer may not seize object felt in pat down search unless it reasonably resembles a weapon); *State v. Hobart*, 94 Wash. 2d 437, 447, 617 P.2d 429, 434 (1980) (pat down search was illegal where its scope was not strictly limited to a search for weapons, but included an exploration the defendant might be in possession of narcotics).

We hold that the scope of a pat down search must be strictly limited to a search for weapons. Absent probable cause for further intrusion, an officer performing a proper *Terry* frisk may not seize an object unless it reasonably

resembles a weapon. Consequently, the trial court erred in concluding Rose's seizure of the cocaine was constitutional.

III.

The trial court concluded the plain feel exception to the traditional warrant requirement justified the seizure of the cocaine. We disagree, and in so doing, decline to adopt the plain feel exception in Minnesota.

Courts that have addressed the "plain feel" issue have treated it as a corollary to the plain view doctrine. *See United States v. Williams*, 822 F.2d 1174, 1181-83 (D.C. Cir. 1987); *United States v. Norman*, 701 F.2d 295 (4th Cir.) *cert. denied*, 464 U.S. 820, 104 S. Ct. 82 (1983); *United States v. Russell*, 655 F.2d 1262 (D.C. Cir. 1981), *vacated and modified in part*, 670 F.2d 323 (D.C. Cir.), *cert. denied*, 457 U.S. 1108, 102 S. Ct. 2909 (1982); *United States v. Ocampo*, 650 F.2d 421, 429 (2d Cir. 1981); *United States v. Portillo*, 633 F.2d 1313, 1320 (9th Cir. 1980), *cert. denied*, 450 U.S. 1043, 101 S. Ct. 1764 (1981); *United States v. Diaz*, 577 F.2d 821, 824 (2d Cir. 1978).

Courts invoke the plain view exception when an officer engaged in a lawful search views an object which he or she had probable cause to believe was contraband. The plain view exception is justified because apprehension of an object already in plain view of an officer lawfully present does not infringe any reasonable expectation of privacy, and "its exposure thus is not a search within the meaning of the Fourth Amendment." *United States v. Williams*, 822 F.2d 1174, 1182 (D.C. Cir. 1987).

We decline to adopt a plain feel exception to the warrant requirement. We believe the proper analysis in this case must focus upon the limited purpose associated with a pat search. We conclude the search of Dickerson exceeded constitutional parameters and we therefore reverse.

IV.

The state argues for the first time on appeal that the search was justified as incident to an arrest. A search is valid as incident to arrest even if conducted before the actual arrest provided (1) the arrest and the search are substantially contemporaneous; and (2) probable cause to arrest existed before the search. *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 s. ct. 2556, 2564 (1980); *United States v. Costello*, 604 F.2d 589, 590-91 (8th Cir. 1979).

The state, however, did not argue this theory to the trial court. The record indicates the state argued only a "plain feel" analysis. At oral argument, the state admitted it failed to present the search incident to arrest theory to the trial court. Parties cannot raise for the first time on appeal issues not presented to the trial court. *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989).

DECISION

The trial court did not err by concluding the police officers properly stopped appellant. However, the pat search of appellant by the police officer exceeded constitutional parameters. We decline to adopt the plain feel exception to the warrant requirement.

Reversed.

Dated: April 24, 1991

ROLAND C. AMUNDSON
Judge of the State Court
of Appeals

APPENDIX C

State of Minnesota
Hennepin County

District Court
Fourth Judicial District

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

File No. 89067687

STATE OF MINNESOTA,

Plaintiff,

vs.

TIMOTHY EUGENE DICKERSON,

Defendant,

The above-entitled matter came on before the undersigned February 20, 1990, upon defendant's motion to dismiss for lack of probable cause. The State of Minnesota was represented by Gail Baez, Esq., and the defendant was represented by Mary Moriarty, Esq. Based upon the testimony produced at the hearing, the arguments of counsel and briefs submitted, the Court makes the following:

FINDINGS OF FACT

1. At approximately 8:15 p.m., on November 9, 1989, Officer Rose of the Minneapolis Police Department

was on routine patrol in his squad in the area of 10th and Morgan Avenue North in the City of Minneapolis, Hennepin County.

2. Rose is a 14-year veteran of the Department, having served 11 1/2 years in North Minneapolis. Over the past two years, he has participated in approximately 75 drug search warrant executions and made between 50 and 75 drug arrests.

3. Officer Rose had personally participated in search warrants at the address at 1030 Morgan Avenue North resulting in drug seizures as well as seizures of guns and knives.

4. Officer Rose had personally responded to complaints at this address of drugs being sold in the hallways.

5. On the evening in question, Officer Rose observed the defendant, a man unknown to him, come out of the front door of the address at 1030 Morgan Avenue North and walk towards the street. Officer Rose observed that when the man saw the squad car, he made an abrupt turn and walked towards the alley.

6. Rose and his partner drove into the alley where they stopped defendant.

7. Officer Rose conducted a pat search of the defendant for weapons. Officer Rose felt a small, hard object wrapped in plastic in defendant's pocket.

8. Based upon his training and experience, Officer Rose formed the opinion that the object in defendant's pocket was crack/cocaine and removed it. Subsequent testing revealed this to be .20 grams of crack/cocaine.

CONCLUSIONS OF LAW

1. Officer Rose had a reasonable suspicion based upon objective facts that defendant was involved in criminal activity.

2. Officer Rose had additional reasonable grounds based upon objective facts to conduct the pat-down search for weapons in the alley.

3. Officer Rose seized the crack/cocaine based upon the feel and touch of the item located in defendant's pocket and this seizure was reasonable.

ORDER

1. Defendant's motion to suppress is denied.

2. Defendant's motion to dismiss for lack of probable cause is denied.

3. The Court finds that probable cause exists that a crime was committed and defendant committed it.

Let the attached memorandum be made part of this Order.

Dated: 3/6/90

BY THE COURT:

ROBERT H. LYNN
Judge of District Court

MEMORANDUM

When Officer Rose detained defendant for the purpose of investigating, he performed a seizure within the confines of the Fourth Amendment. The reasonableness of this seizure depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Pennsylvania v. Mimms,* 434 U.S. 106 (1977). The Fourth Amendment requires that such a seizure must be based upon a reasonable suspicion based on objective facts, that the individual is involved in criminal activity. *Delaware v. Prouse,* 440 U.S. 648 (1979) and *Terry v. Ohio,* 392 U.S. 1 (1968). In this case, Officer Rose observed the defendant coming out of a known crack house at approximately 8:15 p.m. When defendant saw the squad car, he made an abrupt turn and rather than continuing his walk toward the street where the squad car was located, went behind the house toward the alley. These objective facts, when viewed from the perspective of a trained officer who was very familiar with the drug activity at this address, support a reasonable suspicion that defendant was engaged in criminal activity. See *State v. Gobely,* 366 N.W.2d 600 (Minn. 1985), *State v. LaMar,* 382 N.W.2d 266 (Minn. App. 1986) and *State v. Johnson,* 444 N.W.2d 824 (Minn. 1989).

The facts here are distinguishable from those in *Brown v. Texas,* 99 S.Ct. 2637, 443 U.S. 47 (1979). In *Brown, supra,* the United States Supreme Court held that an officer's observation of two men walking away from each other at noon in an alley in an area known for drug activity did not support the subsequent stop. The officer in *Brown* observed activity which was no different from that of any other pedestrian in the neighborhood. Officer Rose, in contrast, based his suspicion upon the fact that defendant was walking out of a notorious "crack house" at 8:15 p.m.,

and made an abrupt change of direction when he observed the squad car.

Once Officer Rose stopped the defendant, was he justified in conducting a pat search for weapons? *Terry* requires a separate basis for such a search, namely articulable facts which support a belief that defendant was armed or dangerous or otherwise presented a danger to the officers. Here, Officer Rose, based upon his personal experience with the crack house defendant had been seen leaving, knew that guns and knives had been seized there. This knowledge, coupled with the stop in a dark alley, supports his decision to conduct the pat search for weapons.

During the pat search, Officer Rose felt an object he concluded was crack/cocaine based upon the feel of the object and the feel of the plastic wrapping. He makes no claim that he suspected this object to be a weapon, rather he removed the object from defendant's pocket in the belief it was contraband, namely cocaine.

This seizure raises a novel question. It is black letter law that an officer may seize contraband in "plain view." Here, Officer Rose made his determination that the object was contraband based upon his sense of touch, grounded in his experience with drug seizures and arrests.

To this Court there is no distinction as to which sensory perception the officer uses to conclude that the material is contraband. An experienced officer may rely upon his sense of smell in DWI stops or in recognizing the smell of burning marijuana in an automobile. The sound of a shotgun being racked would clearly support certain reactions by an officer. The sense of touch, grounded in experience and training, is as reliable as perceptions drawn from other senses. "Plain feel," therefore, is no different than plain view and will equally support the seizure here.

The stop, frisk and seizure of crack/cocaine here were not violative of defendant's constitutional rights.

R.H.L.

APPENDIX D

Minnesota Constitutional and Statutory Provisions

Minn. Const., art. 1, §10:

> **Unreasonable searches and seizures prohibited.** The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be searched and the person or things to be seized.

Minnesota Statute § 152.025, subd. 2(1), subd. 3(a) (1989):

> Subd. 2. **Possession and other crimes.** A person is guilty of controlled substance crime in the fifth degree if:
>
> (1) the person unlawfully possesses one or more mixtures containing a controlled substance classified in schedule I, II, III, or IV, except a small amount of marijuana . . . .
>
> * * *
>
> Subd. 3. **Penalty**. (a) A person convicted under subdivision 1 or 2 may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

Minnesota Statute § 152.18, subd. 1 (1989):

> If any person is found guilty of a violation of section 152.024, 152.025 or 152.027 for possession of a controlled substance, after trial or upon a plea of guilty, the court may, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place the person on probation upon such reasonable conditions as it may require and for a period, not to exceed the maximum term of imprisonment provided for such violation. The court may give the person the opportunity to attend and participate in an appropriate program of education regarding the nature and effects of alcohol and drug abuse as a stipulation of probation. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge the person from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against that person. Discharge and dismissal hereunder shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained by the department of public safety solely for the purpose of use by the courts in determining the merits of subsequent proceedings against such person. The court shall forward a record of any

> discharge and dismissal hereunder to the department of public safety who shall make and maintain the nonpublic record thereof as hereinbefore provided. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime or for any other purpose.

No. 91-2019

In the
Supreme Court of the United States
October Term, 1991

STATE OF MINNESOTA,

Petitioner,

vs.

TIMOTHY E. DICKERSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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1992 — Bachman Legal Printing, 835 Second Ave. So., Mpls., MN 55402 — (612) 339-9518
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QUESTION PRESENTED

Does the rule of Terry v. Ohio, 392 U.S. 1 (1968) permit a police officer to perform a "pat frisk" for evidence, and then, upon discovering an item in a detainee's interior pocket which is clearly not a weapon, to manipulate the item, remove it and inspect it?

PARTIES

The State of Minnesota was represented in the Hennepin County District Court by Ms. Gail Baez, Assistant Hennepin County Attorney, and in the Minnesota appellate courts by Ms. Beverly Wolfe, Assistant Hennepin County Attorney.

The Minnesota Attorney General, Mr. Hubert H. Humphrey III, did not appear in this case, and did not file a brief.

Mr. Timothy E. Dickerson, Respondent in this Court and in the Minnesota Supreme Court, was represented in the Hennepin County District Court by Mr. Scott A. Holdahl and Ms. Mary F. Moriarty, Assistant Hennepin County Public Defenders. Mr. Dickerson was represented in the Minnesota appellate

courts, and is represented in this Court, by Peter W. Gorman, Assistant Hennepin County Public Defender.

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STATEMENT OF THE CASE

Respondent Timothy E. Dickerson accepts the statements of the case and facts which appear in the opinions of the Minnesota appellate courts and in the State's Petition For A Writ Of Certiorari except in these respects:

1) The State failed to note in its Petition that the police officer who performed the "pat-frisk" testified that one of his purposes in doing so was to uncover evidence (T.9).[1]

2) The State failed to note in its Petition that, when the police approached Respondent Dickerson, they did not observe any suspicious bulges in his clothes, and that Dickerson stopped instantly when told to do so, complied

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1. T refers to the transcript of the evidentiary hearing, February 20, 1990.

with the officers' directions, and made no furtive or other threatening gestures (T.17-20).

3) The Minnesota Supreme Court's observation that the size of the piece of cocaine at issue in this case was "the size of a pea or a marble[,]", 481 N.W.2d 840, 843 (Minn. 1992), appears nowhere in the testimonial record. The State did not introduce the cocaine into evidence, nor did the police officer who testified describe its size. The record does not appear to indicate that the cocaine itself was ever in the courtroom, nor observed by any of the lawyers. One of the lawyers in her oral summation described the cocaine as something which might be the size of a pea or a marble (T.47), but the record does not indicate that she or any other

party to the case saw it. All that any party to this case knows, and all that the record reflects, about the cocaine was that it weighed 0.2 gram. The Court may take judicial notice that this is less than an ordinary household 200-milligram aspirin tablet weighs. Fed. R. Evid. 201(b).

SUMMARY OF THE ARGUMENT

1) The State of Minnesota's Petition For A Writ Of Certiorari To The Minnesota Supreme Court should be denied because the case is moot. On May 6, 1992, the Hennepin County District Court, pursuant to Minnesota law, vacated its prior adjudicatory order and deferred sentencing, and dismissed this criminal proceeding. Therefore, no "case or controversy" within the meaning of Article III, § 2 of the United States Constitution exists.

2) The State of Minnesota's Petition For A Writ Of Certiorari To The Minnesota Supreme Court should be denied because the Minnesota appellate courts properly applied the rule of Terry v. Ohio, 392 U.S. 1 (1968).

3) The State of Minnesota's Petition For A Writ Of Certiorari To The Minnesota Supreme Court should be denied because the conflict claimed by the State of Minnesota in the lower courts regarding the use of the so-called "plain touch" exception to the warrant requirement of the Fourth Amendment to the United States Constitution is neither as pronounced nor involves as many cases as the State of Minnesota claims. The cases cited by the State of Minnesota actually involve a number of different theories of arrest and search, not simply the so-called "plain touch" exception.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. 91-2019

STATE OF MINNESOTA,

Petitioner

vs.

TIMOTHY E. DICKERSON,

Respondent.

On Petition For A Writ Of Certiorari

To The Minnesota Supreme Court

Respondent's Brief In Opposition

THE STATE'S PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

I. THIS CASE IS MOOT AND PRESENTS NO "CASE OR CONTROVERSY" WITHIN THE MEANING OF ARTICLE III, § 2 OF THE CONSTITUTION OF THE UNITED STATES.

A. Introduction

Respondent Timothy E. Dickerson was charged in the Hennepin County District Court on December 19, 1989 with the offense of fifth degree controlled substance possession, Minn. Stats. § 152.025, subd. 2(1), § 152.025, subd. 3(a). He moved to suppress the evidence on a number of grounds, one of which was that the police conducted an unlawfully intrusive "pat frisk" of his person which violated the rule of Terry v. Ohio, 392 U.S. 1 (1968).

The Hennepin County District Court heard testimony on Respondent's motion to suppress on February 20, 1990, and issued its ruling denying the motion to suppress on March 6, 1990.

Thereafter, Respondent Dickerson and the State of Minnesota submitted a fact stipulation with waiver of jury trial to the trial court, a procedure permitted under Minnesota law which preserves the right to appeal. *See* State v. Lothenbach, 296 N.W.2d 854 (Minn. 1980). The trial court accepted the fact stipulation, and found that Respondent had committed the offense charged.

On May 9, 1990, the District Court deferred further proceedings under Minn. Stat. § 152.18, a statute commonly used in cases of offenders charged with minor drug offenses.

Under Minn. Stat. § 152.18, a person who either pleads guilty or is found guilty is not formally adjudicated guilty. The trial court prescribes conditions with which the person must comply over a specified period. Following successful compliance with those conditions, the trial court vacates the guilty plea or the finding of guilt, and dismisses the criminal complaint and proceeding.

The statute provides, "Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime or for any other purpose." Minn. Stat. § 152.18, subd. 1. This statute is reproduced at Appendix D-2,3 of the State's Petition For A Writ Of Certiorari. The person is

then entitled to have all records concerning the case expunged from the official records of the court and the police agencies involved, Minn. Stats. § 152.18, subd. 2, § 299C.11, aside from a non-public record kept by the Minnesota Department of Public Safety. *See generally* State v. C.A., 304 N.W.2d 353 (Minn. 1981). These statutes are reproduced here at Appendix B. Such an order "restore[s] the person, in the contemplation of the law, to the status the person occupied before such arrest . . . ." Minn. Stat. § 152.18, subd. 2. The expungement provision of the statute is not self-enforcing: it requires a motion by the defendant.

Respondent Dickerson complied with the conditions of his deferred sentence. On April 28, 1992, just prior to the

scheduled expiration of the supervision period, the Hennepin County probation department's officer prepared the standard order the department uses in cases deferred under Minn. Stat. § 152.18, and presented it to the District Court for signature. The court signed it. The order, which was filed on May 6, 1992, and appears here as Appendix A, vacated the finding of guilt and dismissed the criminal complaint and proceeding.

Respondent Dickerson has not yet sought the formal expungement to which he is entitled by Minn. Stat. § 152.18.

B. The Rule Of Mootness

Article III, § 2 of the United States Constitution limits this Court's

subject-matter jurisdiction to adjudication of "cases or controversies."

One of the rules this Court has adopted in applying Article III is "mootness." Mootness analysis "looks primarily to the relationship between past events and the present challenge in order to determine whether there remains a 'case' or 'controversy' which meets the article III test of justiciability . . . ." Laurence H. Tribe, American Constitutional Law § 3-11, at 82 (2d Ed. 1988). "A case is moot, and hence not justiciable, if the passage of time has caused it completely to lose 'its character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract propositions of law.'" *Id.* at 83.

The rule that courts should not decide cases which have become moot "derives from the common law notion that the function of the judiciary is limited to determining rights and obligations that are actually controverted in the particular case before the court." Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, Supreme Court Practice 711 (6th Ed. 1986).

In a number of criminal cases, this Court has examined the circumstances under which the completion of a criminal prosecution or sentence will render an appeal from that case moot. Every one of this Court's mootness cases involves a criminal conviction or sentence. In the present case, by contrast, there has been no conviction or sentence. In all but one of this Court's mootness cases, the

Appellant or Petitioner before this Court was the criminal defendant in the lower court. *See, e.g.*, Sibron v. New York, 392 U.S. 40 (1968); *but, see* Pennsylvania v. Mimms, 434 U.S. 106 (1977).

One line of this Court's cases holds that completion of a sentence or release from parole, *after conviction*, will render an appeal by the criminal defendant moot. *See* St. Pierre v. United States, 319 U.S. 41 (1943); Jacobs v. New York, 388 U.S. 431 (1967); Tannenbaum v. New York, 388 U.S. 439 (1967); Weinstein v. Bradford, 423 U.S. 147 (1975).

However, a parallel line of cases explicitly holds that a criminal appeal will not be moot if there remains the possibility of some adverse collateral consequence *to the criminal defendant*. *See* Fiswick v. United States, 329 U.S.

211, 220-22 (1946) (alien deportation, loss of civil rights); United States v. Morgan, 346 U.S. 502, 512-13 (1954) (future penalty enhancement, loss of civil rights); Pollard v. United States, 352 U.S. 354, 358 (1957) (unspecified collateral consequences); Ginsberg v. New York, 390 U.S. 629, 633 n. 2 (1968) (municipal regulatory licensing); Sibron v. New York, 390 U.S. 40, 50-58 (1968) (character impeachment at future trial, future penalty enhancement); Evitts v. Lucey, 469 U.S. 387, 391 n. 4 (1985) (same).

Similarly, this Court has also held that a criminal appeal is not moot if reversal of a conviction by the courts ~~below prevents~~ *the state* from imposing adverse consequences in a future criminal proceeding. Pennsylvania v. Mimms, 434

U.S. 106, 108 n. 3 (1977) (bail setting, length of sentence, availability of probation).

C. Mootness When There Is No Conviction Below

Very few federal cases have discussed mootness in the context of an appeal in a criminal case which was dismissed below. Wright and Miller say that "[i]t is difficult to imagine any role for collateral consequences doctrine [to defeat a mootness objection to a government appeal following a dismissal without conviction.]". 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3533.4, at 307 (2d Ed. 1984).

In United States v. Sarmiento-Rozo, 592 F.2d 1318 (5th Cir. 1979) the court

held that dismissal of the criminal case by the trial court for lack of jurisdiction, followed by deportation of the defendants, mooted the government's appeal.

This Court noted United States v. Sarmiento-Rozo, but declined to follow it in a case resting upon a substantially different procedural history. In that case, United States v. Villamonte-Marquez, 462 U.S. 579 (1983), the defendants had been convicted. The convictions were then reversed on appeal, and the defendants were deported. The mootness issue arose in that context, which is substantially different from the facts in United States v. Sarmiento-Rozo, where there was not only no conviction, but also where the charge had been dismissed in the trial court.

D. This Petition Is Moot

In light of the rules established by these cases, this Petition For A Writ Of Certiorari should certainly be denied as moot.

Respondent Dickerson has never been convicted of the crime charged in this case. He has not been jailed, fined, nor subjected to any penal consequence. His case has been dismissed without any adjudication. *See* Appendix A. His character can never be impeached by reference to this proceeding, he cannot suffer any regulatory licensing handicap, *see* Bourbon Bar and Cafe v. City of St. Paul, 466 N.W.2d 438 (Minn. Ct. App. 1991), he cannot be deported, and no future criminal penalty can be enhanced by reference to this proceeding.

Under Minn. Stats. § 152.18 and § 299C.11, Mr. Dickerson has an absolute right to have all information related to this case expunged from the records of the District Court and the police agencies involved, aside from the single non-public record which the Minnesota Department of Public Safety is permitted to keep. Once he obtains this mandatory expungement relief, his status is the same as it was before his arrest. Minn. Stat. § 152.18, subd. 2.

It is thus patently clear that Respondent Dickerson has neither suffered, nor will he suffer from, any adverse collateral consequence of this criminal proceeding. In short, this criminal proceeding will have absolutely no effect on his future life.

Moreover, it is just as clear that the State of Minnesota has not suffered, and will not suffer, from its inability to impose in the future any adverse collateral consequence relating to this case. *See* Pennsylvania v. Mimms, 434 U.S. 106, 108 n. 3 (1977).

The Minnesota Supreme Court's ruling in this case had nothing to do with the issuance of the "vacate and dismiss" order filed under Minn. Stat. § 152.18 in this case. *See* Appendix A. After the Minnesota Court of Appeals issued its ruling in April, 1991, Respondent Dickerson's counsel instructed him to continue to comply with the District Court's deferred sentence. He did so. When the District Court signed its order of April 28, 1992 which vacated the finding of guilt and dismissed the

criminal case, it did so, not because of the Minnesota Supreme Court's ruling, but because the specified time period had run and Respondent Dickerson had complied with its orders. *See* Appendix A.

What deprives the State of any future adverse collateral use of this criminal proceeding is Mr. Dickerson's satisfactory completion of the conditions of the deferred sentence, and the dismissal of the case to which Dickerson was entitled under state law, not the Minnesota Supreme Court's ruling on the evidentiary issue.

The State of Minnesota may claim that it should have the right to make adverse use of this criminal proceeding in the future, and that the Minnesota Supreme Court's ruling below deprives it of that right. However, the only

conceivable adverse use would be ensuring that Respondent would not again obtain a second deferred sentence, should he again be charged with this type of drug offense.

However, such a claim is quite hypothetical because it assumes that Respondent Dickerson, a first offender at the time this case arose, would again be charged with a similar offense. Besides its speculative nature, such a claim ignores three facts.

First, it ignores this Court's holding that the mere future possibility that a convict might again be in prison (or convicted of a crime) does not defeat a mootness claim on appeal, Weinstein v. Bradford, 423 U.S. 147, 149 (1975).

Second, it ignores the fact that it is not the Minnesota Supreme Court's ruling in this case that deprives the State of adverse collateral use of this proceeding. Rather, it is the operation of the statute under which Mr. Dickerson's sentence was deferred, Minn. Stat. § 152.18, that does so.

Third, it ignores the fact that there is nothing in Minn. Stat. § 152.18 which prohibits its use with the same offender a second time. Even if Respondent Dickerson should be charged with a similar offense a second time, and even if this Court were to reverse the Minnesota Supreme Court on the evidentiary issue, the existence of the non-public record of this proceeding would not necessarily prevent a similar deferred sentence from being imposed in

the future. Because the existence of a first deferred sentence under Minn. Stat. § 152.18 does not prevent a person from receiving a second deferred sentence under that statute, the State of Minnesota is not deprived by the Minnesota Supreme Court's ruling in this case of any adverse collateral use of this criminal proceeding. The Petition is, for that additional reason, moot.

For all of these reasons, this Court should deny the Petition For A Writ Of Certiorari on the ground that the case is moot.

II. THE MINNESOTA COURTS PROPERLY APPLIED THE RULE OF TERRY v. OHIO, 392 U.S. 1 (1968).

A. Introduction

Respondent Dickerson strenuously objects to the manner in which the State of Minnesota has characterized the issue in this case.

The State would have this Court believe that its officer, while performing a "pat frisk" that the Minnesota courts held proper, actually saw cocaine but that the State was nevertheless precluded from prosecuting Respondent for possession of that cocaine. Petition For A Writ Of Certiorari at 10-11, *citing*, Michigan v. Long, 463 U.S. 1032 (1983).

This argument, which the State of Minnesota also made unsuccessfully in

this case before the Minnesota Supreme Court, State's Petition For Further Review at 5-6, misstates both the issue and holdings by the Minnesota courts.

Moreover, the State appears to imply, incorrectly, in its "Question Presented" that the officer made a warrantless arrest on probable cause before seizing the object.

The State then compounds its errors by citing this Court to a plethora of cases which deal with at least five other issues which have nothing to do with this case. It uses these cases to try to demonstrate a nationwide split in authorities in an attempt to satisfy this Court's Rule 10.1(b).

Properly phrased on the record in this case, the issue is whether Terry v. Ohio, 392 U.S. 1 (1968) permits a police

officer to perform a "pat frisk" for evidence, and then, upon discovering an item in a detainee's interior pocket which is clearly not a weapon, to manipulate it, remove it and inspect it.

When the Minnesota Supreme Court's decision is analyzed by reference to the record and to the exact issue it decided, and when the host of cases to which the State has cited this Court is pared away, it is clear that the Minnesota appellate courts properly applied Terry v. Ohio, 392 U.S. 1 (1968), and that, as shown herein, there does not exist the conflict in the lower courts that the State claims.

B. Application Of Terry v. Ohio To This Case

The Minneapolis officer who testified in this case told the District Court that he stopped Respondent Dickerson because 1) he saw Dickerson leaving a twelve-unit apartment building known to police as the site of prior narcotics enforcement activity, and 2) he believed Dickerson had seen the police car, and had then changed direction (T.7-8,15,20-21).

The officer then told the court that he drove his car into the alley behind the apartment building to confront Dickerson because he thought Dickerson's change of course suspicious (T.9,15-16,20).

He testified that he stopped Dickerson "[t]o check him for weapons and

contraband[,]" (T.9), and that, while performing the frisk of Mr. Dickerson, whom he had never seen before (T.14):

> I came back up to the chest and I hit a nylon jacket that had a pocket and the nylon jacket was very fine nylon and as I pat-searched the front of his body I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane.

(T.9). He then removed the object (T.9). Until the officer removed the cocaine from Mr. Dickerson's pocket, Dickerson was not suspected of a crime, was not in any way related to the officer's presence in that area, and was not under arrest (T.14-16).

Although the officer claimed that he knew right away what he felt in Mr. Dickerson's pocket, he did not make a warrantless felony arrest on probable

cause until after he had removed the object and inspected it (T.9-10).

The District Court stated in its memorandum that the officer did not feel a weapon during the "pat frisk." *See* State's Petition For A Writ Of Certiorari, Appendix C-5. The record supports its conclusion on that point.

There is nothing revolutionary, or even surprising, in the Minnesota Supreme Court's ruling in light of this record. All that court did was to apply this Court's ruling in Terry v. Ohio, 392 U.S. 1 (1968) to the facts before it. The Minnesota court said:

> The pat search of the defendant went far beyond what is permissible under *Terry* . . . .
>
> *Terry* permits a protective frisk for weapons. When the officer assures himself or herself that no weapon is present, the frisk is over. During the course of the

> frisk, if the officer feels an object that cannot possibly be a weapon, the officer is not privileged to poke around to determine what that object is; for purposes of a *Terry* analysis, it is enough that the object is not a weapon.

State v. Dickerson, 481 N.W.2d 840, 843-44 (Minn. 1992). *See also* United States v. Williams, 822 F.2d 1174, 1184 (D.C. Cir. 1987) (officer may not manipulate object discovered during "pat frisk" which is clearly not a weapon).

Referring to the officer's testimony that his purposes in searching were to discover weapons and contraband, the court observed, "he set out to flaunt the limitations of *Terry*, and he succeeded." State v. Dickerson, 481 N.W.2d at 844. *See* United States v. Williams, 822 F.2d 1174, 1181 n. 75 (D.C. Cir. 1987) (officer's Terry search

improper because he thought he would find narcotics, not a weapon).

The Minnesota Supreme Court also questioned the police officer's testimony that he knew immediately the nature of the object. It said:

> The officer's 'immediate' perception is especially remarkable because this lump weighed 0.2 grams and was no bigger than a marble. . . . But a close examination of the record reveals that . . . the officer's 'immediate' discovery in this case is fiction, not fact.
>
> The officer testified that he was sure he had found crack cocaine only after (1) feeling a lump, (2) manipulating it with his fingers, and (3) sliding it within the defendant's pocket. That testimony belies any notion that he 'immediately' knew what he had found.

Id.

The Minnesota Supreme Court's decision in this case is completely loyal to the teaching of Terry v. Ohio, 392

U.S. 1 (1968); *see also* Commonwealth v. Marconi, 597 A.2d 616, 623 (Pa. Super. 1991) (not all small particles discovered by touch in a detainee's pocket are drugs).

This Court's opinion in Terry v. Ohio is nothing if not cautious, and is clear that the exception it created was *solely* limited to protecting the police officer's safety. *Id.* at 26-30.

Subsequent decisions of this Court, including the one cited by the State of Minnesota in its Petition, have maintained fidelity to the limits Terry v. Ohio placed on "pat frisks." *See* Michigan v. Long, 463 U.S. 1032, 1049 n. 14 (1983) (*Terry* search is not justified by need to uncover and preserve evidence, but is limited to protection of the police officer).

The State attempts to make this Court's decision in Michigan v. Long stand for more than it does. That case simply applied the rule of Terry v. Ohio to the interior of an automobile, a rule that Minnesota adopted two years earlier. *See* State v. Gilchrist, 299 N.W.2d 913 (Minn. 1980). Once the officer in Michigan v. Long saw the contraband while performing a proper Terry v. Ohio search, he had probable cause to arrest, and to conduct a further examination pursuant to that arrest. Michigan v. Long, 463 U.S. 1032, 1036 (1983).

III. THE STATE'S REMAINING THEORIES NEITHER SUPPORT THE SEARCH IN THIS CASE NOR DEMONSTRATE A CONFLICT AMONG THE LOWER COURTS.

A. Perception Of A Weapon During A "Pat Frisk"

The State of Minnesota has cited this Court to three cases in which firearms were discovered during a "pat frisk." *See*, Matter of Marrhonda G., 575 N.Y.S.2d 425 (N.Y. Fam. Ct. 1991); State v. Ortiz, 683 P.2d 822 (Haw. 1984); People v. Chavers, 658 P.2d 96 (Cal. 1983). The State is apparently attempting to show that the Minnesota Supreme Court's ruling below conflicts with these cases and would prevent the police from seizing a weapon discovered by sense of touch during a proper "pat frisk."

This argument fails because the Minnesota Supreme Court's ruling in this case contains nothing which prevents a police officer from seizing a gun he has located, even if by sense of touch, during a proper "pat frisk."

People v. Chavers permitted a Terry v. Ohio search of the glove box of a car which had been stopped because its occupants were suspects in an armed robbery. People v. Chavers, 658 P.2d at 101-103. State v. Ortiz permitted a Terry v. Ohio search of a suspect's knapsack. State v. Ortiz, 683 P.2d at 826-27. Matter of Marrhonda G. involved an officer's wholly inadvertent discovery of a weapon inside a knapsack that he picked up from the floor of a police station. Matter of Marrhonda G., 575 N.Y.S.2d at 428.

Nothing in the Minnesota court's decision in this case prevents a police officer from detecting the presence of, and seizing, a weapon during the course of a proper Terry v. Ohio pat frisk. In fact, the Minnesota court has long held that a weapon which is felt during a proper Terry v. Ohio "pat frisk," may be retrieved and admitted into evidence. *See*, State v. Gilchrist, 299 N.W.2d 913 (Minn. 1980). Moreover, the State's argument on this point ignores the facts of Terry v. Ohio itself, in which the officer felt and retrieved a weapon.

In short, nothing about the decision below in this case prevents the police from properly performing a Terry v. Ohio "pat frisk," and retrieving a weapon while doing so.

B. Searches Of Containers The Contents Of Which Are Immediately Apparent

In a related vein, the State of Minnesota has cited this Court to several cases dealing with searches of containers, the contents of which are immediately apparent. *See* State v. Vasquez, 815 P.2d 659 (N.M. Ct. App. 1991); Matter of Marrhonda G., 575 N.Y.S.2d 425 (N.Y. Fam. Ct. 1991); United States v. Williams, 822 F.2d 1174 (D.C. Cir. 1987); United States v. Ocampo, 650 F.2d 421 (2d Cir. 1981); United States v. Portillo, 633 F.2d 1313 (9th Cir. 1980).

The State's goal in citing these cases appears to be to equate the so-called "plain touch" search here with "plain view" searches, and to suggest that the Minnesota Supreme Court's ruling in this case, which did not involve a

container, conflicts with various "container search" cases from other jurisdictions.

The "contents immediately apparent" cases generally hold that, if the containers betray their contents, by means of a sensory perception (sight, smell, touch), they can properly be searched without a warrant. *See* United States v. Williams, 822 F.2d 1174 (D.C. Cir. 1987). They do not, however, support the State's argument, and have little to do with the case at hand, for the following reasons:

First, the "contents immediately apparent" cases rest upon a dictum in this Court's decision in Arkansas v. Sanders, 442 U.S. 753, 764-65 n. 13 (1979). That dictum suggested that searches of some containers would not

violate the Fourth Amendment because the containers, the contents of which can be inferred from their outward appearance, did not support a reasonable expectation of privacy. One of the examples given in the dictum was a gun case.

However, this Court overruled Arkansas v. Sanders last term in California v. Acevedo, ___ U.S. ___, ___, 111 S.Ct. 1982, 1989 (1991). Since Arkansas v. Sanders was overruled, it is reasonable to conclude that its discussion of note 13 is also overruled, although one New York trial court has concluded otherwise. Matter of Marrhonda G., 575 N.Y.S.2d 425, 430 n. 2 (1991). While it may be that this dictum is nothing more than traditional "plain view" analysis, and while it may be true that some containers, particularly

firearms cases, may betray their contents so as to lose any Fourth Amendment protection, application of the Arkansas v. Sanders dictum to the interior of Respondent Dickerson's jacket pocket is indeed labored.

Second, the "contents immediately apparent" cases essentially hold that a possessor has no privacy interest in containers, the contents of which are visible to the public. *See* United States v. Ocampo, 650 F.2d 421, 429 (2d Cir. 1981); United States v. Williams, 822 F.2d 1174 (D.C. Cir. 1987). By contrast, Respondent's act of secreting the minuscule amount of contraband involved in this case in an interior pocket of an opaque garment in fact manifested an expectation that his pocket's contents would remain private,

impervious to public inspection. Moreover, four of the five cases the State has cited on this point involve vehicles. This Court has long held that an individual has a significantly reduced expectation of privacy in vehicles and their contents. *See, e.g.*, California v. Carney, 471 U.S. 386, 391 (1985).

Third, the "contents immediately apparent" cases typically involve items that are seen and readily identifiable. By contrast, it is not possible to as readily identify objects touched, especially when they are minuscule, like the object in this case. As the Washington Supreme Court said, "The tactile sense does not usually result in the *immediate* knowledge of the nature of the item." State v. Broadnax, 654 P.2d 96, 102 (Wash. 1982). The Minnesota

Supreme Court, as noted previously, explicitly agreed with this sentiment when it questioned the officer's conclusion that he knew immediately what he had touched. State v. Dickerson, 481 N.W.2d 840, 844 (Minn. 1992).

More importantly, detection of evidence by sight or smell may be accomplished without a physical intrusion, unlike the tactile detection of evidence in this case. State v. Broadnax, 654 P.2d at 102.

C. Warrantless Arrest On Probable Cause And Incidental Search

The State of Minnesota appears to argue that the Minneapolis officer, having felt the object in Respondent Dickerson's pocket, had probable cause to make a warrantless felony arrest for

possession of cocaine, and therefore could have performed a warrantless search incident to that arrest. In making this argument, the State cites to a number of decisions, and to this passage from Professor LaFave's treatise:

> Assuming the object discovered in the pat-down does not feel like a weapon, this only means that a further search may not be justified under a *Terry* analysis. There remains the possibility that the feel of the object, together with other suspicious circumstances, will amount to probable cause that the object is contraband . . . in which case there may be a further search based upon that probable cause.

3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.4(c), at 524 (2d Ed. 1987) (*hereinafter*, LaFave).

Respondent Dickerson does not dispute that the posture of this case

would be different if the officer, having felt the object, and given the circumstances then existing, had immediately made a warrantless arrest on probable cause, and then retrieved the object as part of an incidental search. But he did not do that.

Because there *is* no exception to the warrant requirement which permits a search on probable cause of something other than a vehicle, the scenario just described must be the subject of the LaFave passage.

The principal case LaFave uses to support this conclusion is State v. Ludtke, 306 N.W.2d 111 (Minn. 1981). That case was presented to the Minnesota appellate courts by Respondent Dickerson, and was discussed at length by the Minnesota Supreme Court. That court

treated State v. Ludtke as a search incident to a warrantless arrest. *See* State v. Dickerson, 481 N.W.2d at 846.

The State's reconstruction of what actually occurred in the Minnesota courts, in conjunction with its "further search on probable cause" argument, raises a number of problems.

First, the State did not argue this position before the District Court, a fact noted by the Minnesota Court of Appeals. *See* State v. Dickerson, 469 N.W.2d 462, 467 (Minn. Ct. App. 1991).

Second, the officer's testimony, as construed by the Minnesota Supreme Court, belies any claim that he immediately had probable cause to arrest for possession of cocaine. The Minnesota Supreme Court characterized this claim as "fiction," noting that the officer, although he

claimed he knew immediately that he had touched cocaine, nevertheless manipulated the object with his fingers and slid it in Respondent's pocket. State v. Dickerson, 481 N.W.2d at 844.

Third, the fact of the matter is that the officer did *not* make a warrantless arrest for cocaine possession until *after* he had removed and examined the object. This Court has repeatedly held that a search incident to arrest may not precede the arrest. *See* Smith v. Ohio, 494 U.S. 541 (1990).

Fourth, the State fails to note that, in the same section of his treatise, LaFave also says, "Under the better view, then, a search is not permissible when the object felt is soft in nature." 3 LaFave, *supra* § 9.4(c), at 523.

Fifth, in each of the cases cited by Petitioner on this point, just as in State v. Ludtke, 306 N.W.2d 111 (Minn. 1980), the police had probable cause to make a warrantless felony arrest, and thus, an incidental search. Ruffin v. Commonwealth, 409 S.E.2d 177 (Va. Ct. App. 1991); Jackson v. State, 804 S.W.2d 735 (Ark. Ct. App. 1991); State v. Richardson, 456 N.W.2d 830 (Wis. 1990); United States v. Ceballos, 719 F.Supp. 119 (E.D.N.Y. 1989); State v. Vanacker, 759 S.W.2d 391 (Mo. Ct. App. 1988); State v. Lee, 520 So.2d 1229 (La. Ct. App. 1988); State v. Bearden, 449 So.2d 1109 (La. Ct. App. 1984). To the same effect is this Court's decision in Texas v. Brown, 460 U.S. 730, 742 (1983), which the State suggests should control the

question of the so-called "plain touch" search.

In a further effort to justify the search in this case as a search incident to a warrantless arrest on probable cause, the State has cited this Court to several cases discussing the formation of probable cause based upon smell of contraband. *See* Petition For A Writ Of Certiorari at 12. These cases are irrelevant to the issue at hand.

Simply put, searches based on smell and the other sense-based searches at issue in the cases cited by the State are not of like kind, and cannot be analyzed as such. Certain odors are so distinctive that probable cause to arrest may immediately exist. However, tactile impressions, particularly of objects no larger than an aspirin tablet, *see*

Commonwealth v. Marconi, 597 A.2d 616, 623 (Pa. Super. 1991), cannot be so easily ascertained, and certainly not without a physical intrusion. State v. Broadnax, 654 P.2d 96, 102 (Wash. 1982). As the court said in a case involving a similar search, "To sanction a search under the facts of this case would be to allow police officers to assume that all small objects in one's pocket could be drugs." Commonwealth v. Marconi, 597 A.2d 616, 623 (Pa. Super. 1991).

CONCLUSION

For the reasons discussed here, this Court should: 1) deny the State's Petition For A Writ Of Certiorari because the case is moot; 2) deny the State's Petition because the Minnesota appellate

courts properly applied the rule of Terry v. Ohio, 392 U.S. 1 (1968); 3) deny the State's Petition because it has not demonstrated that a conflict actually exists in the lower courts over the use of the so-called "plain feel" exception to the warrant requirement.

Respectfully submitted,

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HENNEPIN COUNTY PUBLIC DEFENDER

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July 13, 1992

INDEX TO APPENDICES

STATE OF MINNESOTA	**DISTRICT COURT**
COUNTY OF HENNEPIN	**4TH JUDICIAL DIST.**

State of Minnesota,	)	**ORDER**
	)	**DISCHARGING**
Plaintiff,	)	**DEFENDANT**
	)	**FROM**
SIP No. 89-067687	)	**SUPERVISION**
	)	**AND**
CO. ATTY. No. 89-3646	)	**DISMISSING**
	)	**COMPLAINT**
TIMOTHY E. DICKERSON,	)	
	)	
Defendant.	)	

****

WHEREAS, the above named defendant has been under supervision of the Bureau of Community Corrections, Felony Probatic pursuant to an Order of this Co , and

WHEREAS, said Felony Probation reports that the defendant has made satisfactory progress and recommends his discharge from supervision and,

WHEREAS, the Hennepin County Attorney has recommended that this Court dismiss the Complaint on the file herein.

NOW THEREFORE IT IS HEREBY ORDERED That the defendant be discharged from supervision by the Felony Probation Division, and

IT IS FURTHER ORDERED, That the Complaint on file herein be and the same is hereby dismissed.

By the Court:

/S/ Robert H. Lynn

Judge Robert H. Lynn

DATED: 4/28/92

Minn. Stat. § 152.18, subd. 2:

Upon the dismissal of such person and discharge of the proceedings against the person pursuant to subdivision 1, such person may apply to the district court in which the trial was had for an order to expunge from all official records, other than the nonpublic record retained by the department of public safety pursuant to subdivision 1, all recordation relating to arrest, indictment or information, trial and dismissal and discharge pursuant to subdivision 1. If the court determines, after hearing, that such person was discharged and the proceedings dismissed, it shall enter such order. The effect of the order shall be to restore the person, in the contemplation of the law, to the

status the person occupied before such arrest or indictment or information. No person as to whom such an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of the person's failure to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made for the person for any purpose.

Minn. Stat. § 299C.11:

. . . Upon the determination of all pending criminal actions or proceedings in favor of the arrested person, the arrested person shall, upon demand, have all such finger and thumb prints, photographs, and other identification data, and all copies and duplicates thereof, returned, provided it is not established that the arrested person has been convicted of any felony, either within or without the state, within the period of ten years immediately preceding such determination.

No. 91-2019

In the
Supreme Court of the United States
October Term, 1991

STATE OF MINNESOTA,

Petitioner,

vs.

TIMOTHY DICKERSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX INDEX

TABLE OF AUTHORITIES

REASONS FOR GRANTING THE WRIT

I. THE POSSIBILITY THAT COLLATERAL LEGAL CONSEQUENCES WILL BE IMPOSED UPON RESPONDENT AS A RESULT OF THE TRIAL COURT'S FINDING OF GUILT SHOWS THAT THIS CASE PRESENTS A LIVE CONTROVERSY AND IS NOT MOOT.

Under Article III, § 2 of the United States Constitution, this Court may only adjudicate ongoing cases or controversies. There is a continuing controversy in this case and the recent dismissal of the complaint against Respondent under the provisions set forth in Minn. Stat. § 152.18, subd. 1 (1989) does not render it moot.

"[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Sibron v. New York*, 392 U.S. 40, 51 (1968). This Court has repeatedly "adjudicated the merits of criminal cases in which the defendant has been" discharged from either a probationary or prison sentence. *Id.* In several cases, this Court has held that a case is not moot if the underlying criminal proceedings may subject the defendant to enhanced sentences in future criminal proceedings. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985); *Benton v. Maryland*, 395 U.S. 784, 787-91 (1969) (although possibility that the conviction may some day enhance the petitioner's sentence in a future criminal prosecution "may well be a remote one, it is enough to give this case an adversary cast and make it justiciable"); *Street v. New York*, 394 U.S. 576, 579 n.3 (1969).

In rejecting a defendant's claim that the State of Pennsylvania's petition from an adverse state court ruling was moot because the defendant had already completed his sentence, this Court noted:

> [This Court's] more recent cases have held that the possibility of a criminal defendant's suffering "collateral legal consequences" from a sentence already served permits him to have his claims reviewed here on the merits. If the prospect of the State's visiting such collateral consequences on a criminal defendant who has served his sentence is a sufficient burden as to enable him to seek reversal of a decision affirming his conviction, the prospect of the State's inability to impose such a burden following a reversal of the conviction of a criminal defendant in its own courts must likewise be sufficient to enable the State to obtain review of its claims on the merits here. In any future state criminal proceedings against respondent, this conviction may be relevant to setting bail and length of sentence, and to the availability of probation.

Pennsylvania v. Mimms, 434 U.S. 106, 108 n.3 (1977).

Here, collateral consequences may still be imposed upon Respondent despite the dismissal of the complaint pursuant to Minn. Stat. § 152.18, subd. 1. The trial court found Respondent guilty of the charged offense (T. 65-66).[1] Under the diversionary disposition provisions of

1. "T" refers to the transcript of the pretrial, trial and sentencing proceedings in this case.

Minn. Stat. §152.18, subd. 1, the trial court deferred entry of the adjudication of guilt and placed Respondent on probation for a period of two years.[2] Pursuant to the provisions of Minn. Stat. § 152.18, subd. 1, the trial court filed an order[3] discharging Respondent from probation and dismissing the underlying complaint.

Respondent's mootness claim is based upon his erroneous belief that his discharge from probation without an entry of an adjudication of guilt means he will not suffer any adverse collateral consequence as a result of the criminal proceedings in this case. But statutory and case law show that, if the Minnesota Supreme Court's decision is

2. Both the transcript and the probation order show that a probationary sentence was imposed upon Respondent (T.69-70). *See* Probation Order (reprinted in Appendix A). This probationary sentence required Respondent to adhere to certain conditions. Therefore, Respondent's claim that he was not "subjected to any penal consequence" is erroneous. *See* Respondent's Brief in Opposition to Petition for a Writ of Certiorari, p.13. On October 3, 1990, it was reported that Respondent had violated a condition of his probation and the stay of imposition was revoked. *See* Report of the Department of Court Services and Order of the Court for Defendant's Arrest, Detention and Summary Hearing (reprinted in Appendix B). On November 5, 1990, this revocation was vacated and Respondent was again placed on probation.

3. This order, which was signed on April 28, 1992 and filed on May 6, 1992, is reprinted in Appendix A of Respondent's Brief in Opposition to Petition for a Writ of Certiorari. This is a routine order for cases governed by Minn. Stat. § 152.18 (1989). It should be noted that although the order states the Hennepin County Attorney recommended that the court dismiss the complaint, the Hennepin County Attorney's Office was not notified about this order until after it was filed. Since Respondent successfully completed probation and was entitled to this discharge and dismissal, the Hennepin County Attorney's Office did not file a motion requesting vacation of this order.

reversed by this Court, Respondent will be subject to adverse collateral consequences.

Defendants who have been discharged under Minn. Stat. § 152.18 are not accorded the same status as defendants who have had charges dismissed, been acquitted at trial, or had their convictions reversed on appeal. Because Minn. Stat. § 152.18 requires that a finding or admission of guilt occur before this diversionary disposition can be utilized, defendants discharged under this statute are not entitled to the broader expungement relief available under Minn. Stat. § 299C.11.[4] Relief under Minn. Stat. § 299C.11 is not applicable to criminal proceedings where there has been a finding or admission of guilt even though no formal adjudication of guilt was entered.[5] *See City of St. Paul v. Froysland*, 246 N.W.2d 435, 436, 439 (Minn. 1976) (the policy underlying Minn. Stat. § 299C.11 is to protect those who have had a "'determination of all pending criminal actions or proceedings in favor of the arrested person,'" not those who have pled guilty and served a probationary sentence). Respondent will only be entitled to expungement relief under Minn. Stat. § 299C.11 if the Minnesota Supreme Court's decision is allowed to stand.

Additionally, Minn. Stat. §152.18, subd. 1,[6] provides that when a defendant is discharged under this statute:

---

4. This statute and Minn. Stat. 152.18, subd. 2 (1989), are reprinted in Appendix B of Respondent's Brief In Opposition to Petition for a Writ of Certiorari.

5. Respondent erroneously claims that he is entitled to expungement under Minn. Stat. § 299C.11. *See* Respondent's Brief in Opposition to Petition for a Writ of Certiorari, pp. 5, 14.

6. This statute is reprinted in Appendix D of the Petition for a Writ of Certiorari.

> Discharge and dismissal hereunder shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained by the department of public safety solely for the purpose of use by the courts in determining the merits of subsequent proceedings against such persons.

In *State v. Goodrich*, 256 N.W.2d 506 (1977),[7] the Minnesota Supreme Court relied upon the above-quoted statutory language when it rejected a mootness argument that is identical to Respondent's argument. In holding that the dismissal of the proceedings pursuant to Minn. Stat. § 152.18 did not render the defendant's appeal moot, the supreme court stated:

> The statute contemplates use of the record should defendant have "future difficulties with the law." We accordingly find a sufficient "possibility" of "adverse collateral legal consequences" to hold that this appeal is not moot.

Goodrich, 256 N.W.2d at 512. *See generally Hewett v. North Carolina*, 415 F.2d 1316, 1322 (4th Cir. 1969) (discharge from sentence did not make case moot since "[a]ny judge who might be called upon to consider probation or sentence for future offenses for either of

---

7. Respondent cited this case when he argued below that the absence of an adjudication of guilt did not bar appeal of his case. *See* Brief for Appellant, *State v. Dickerson*, 469 N.W.2d 462 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn. 1992), p.1.

petitioners would be bound to be influenced by that petitioner's prior probationary experience").

More significantly, as demonstrated by the Eighth Circuit Court of Appeals decision in *United States v. Frank*, 932 F.2d 700 (8th Cir. 1991), *the deferred adjudication in this case will be included in Respondent's criminal history score if he is convicted of a federal offense.* Like Respondent, the defendant in *Frank* was given a stay of adjudication and placed on probation under Minn. Stat. § 152.18. When he was subsequently convicted of a federal offense, the defendant's prior disposition under §152.18 was included in the calculation of his criminal history score. The Eighth Circuit held that inclusion of this prior diversionary disposition in the defendant's criminal history score was proper under U.S.S.G. §§ 4A1.1(c) and 4A1.2(f)[8] since diversionary dispositions can only be imposed under Minn. Stat. § 152.18 after a finding or admission of guilt has been made. *See Frank*, 932 F.2d at 701; *see also United States. v. Giraldo-Lara*, 919 F.2d 19, 22-23 (5th Cir. 1990) (held that a deferred adjudication probation in a Texas state court was properly included in the calculation of the defendant's criminal history score under the United States Sentencing Guidelines).

Significant collateral consequences are imposed upon a defendant following the successful completion of a diversionary disposition under Minn. Stat. § 152.18. This disposition will be relevant to both the availability of probation and the length of sentences in future criminal proceedings involving Respondent. But unless the Minnesota Supreme Court's decision is reversed,

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8. These United States Sentencing Guidelines provisions and their supporting commentary are reprinted in Appendix D.

Respondent will not be subject to any of these collateral consequences. The State of Minnesota's inability to impose these collateral consequences upon Respondent "is sufficient to enable the State to obtain review of its claims on the merits here." *Mimms*, 434 U.S. at 108 n.3. Therefore, this case is not moot and the State of Minnesota respectfully requests that review be granted.

II. THIS CASE SHOULD NOT BE DEEMED MOOT SINCE THE "PLAIN FEEL" ISSUE IS LIKELY BOTH TO RECUR AND EVADE REVIEW.

This Court has considered technically moot cases on their merits when the issues presented were "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1911). The "plain feel" issue raised in this case is one that is most likely to arise in cases involving the seizure of small amounts of controlled substances. In Minnesota, first-time defendants charged with possession of small amounts of controlled substances generally receive a diversionary disposition under Minn. Stat. § 152.18. Consequently, it is likely that in most Minnesota criminal cases where the "plain feel" issue will arise, the underlying complaint will be dismissed pursuant to Minn. Stat. § 152.18 before the case can come before this Court on review.

Assuming *arguendo* that this instant case is technically moot, it is requested that this court accept review because this issue is of critical importance to future law enforcement activities and will undoubtedly reoccur. Otherwise, the State of Minnesota will be seriously penalized by an adverse ruling on a Fourth Amendment issue that it, through no fault of its own, has been barred

from obtaining review by this court. *But see Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) ("'capable of repetition, yet evading review'" doctrine applicable only when "there was a reasonable expectation that the same complaining party would be subjected to the same action again").

III. IF THIS CASE IS ENTIRELY MOOT, THIS COURT SHOULD VACATE THE JUDGMENTS BELOW.

Assuming *arguendo* that this case is moot, then the State of Minnesota respectfully requests that this Court vacate the judgments below by the Minnesota Supreme Court and the Minnesota Court of Appeals. In *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950), this Court stated:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss . . . . That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. *When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminar* [Footnote omitted; emphasis added.]

At least two federal circuit courts of appeals, the Fifth and Eleventh Circuits, have explicitly vacated the judgment below when a federal criminal case has been deemed moot on appeal. *See In Re Ghandtchi*, 705 F.2d 1315, 1316 (11th Cir. 1987); *United States v. Sarmiento-Rozo*, 592 F.2d 1318, 1321 (5th Cir. 1979).

This Court has also vacated judgments from state supreme courts in civil cases and remanded "for such proceedings as by that court may be deemed appropriate." *DeFunis v. Odegaard*, 416 U.S. 312, 320 (1974).

The *Munsingwear* doctrine should be applied to state criminal cases such as the instant case. Unless the judgments below are vacated, the State of Minnesota will be unfairly prejudiced in future cases by the precedential effect that these judgments will undoubtedly have. *See generally Sarmiento-Rozo*, 592 F.2d at 1321.

CONCLUSION

There is a live controversy in this case and Respondent's mootness argument should be rejected. If this Court finds that this case is moot, it is respectfully requested that this Court vacate the judgments below.

For the reasons discussed herein and in the Petition for a Writ of Certiorari, the State of Minnesota respectfully requests that this Court grant the Petition for a Writ of Certiorari to review the judgment of the Minnesota Supreme Court.

Respectfully submitted,

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Attorneys for Petitioner

July 28, 1992

APPENDIX

APPENDIX A

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Court No. 89067687

State of Minnesota,

Plaintiff,

PROBATION ORDER

vs.

Timothy Eugene Dickerson,

Defendant.

On May 9, 1990, *the above-named defendant entered a plea of guilty to the crime of* CONTROLLED SUBSTANCE CRIME FIFTH DEGREE - POSSESSION *and thereafter on* May 9, 1990, *defendant was placed on probation, without an adjudication of guilty under provisions of Minnesota Statute 152.18.*

And the Court being of the opinion that by reason of the character of defendant and the circumstances of this case it will be for the best interest of defendant and the best interest of justice that defendant be placed on probation for

the period and upon the conditions in this Order hereinafter specified.

NOW THEREFORE, IT IS ORDERED that in accordance with M.S. 152.18 defendant is placed on probation until May 8, 1992, *and assigned to the Hennepin County Department of Court Services for supervision.*

Said probation is granted, however, upon the express condition defendant shall observe the following order, rules and regulations:

Be truthful to your Probation Officer in all matters.
Keep your Probation Officer informed at all times of your place of residence and employment, and make no change in these without the knowledge and consent of your Probation Officer.
Do not leave the State of Minnesota without the consent of your Probation Officer.
Report to your Probation Officer as directed.
Do not incur any financial indebtedness without the knowledge and consent of your Probation Officer.
Obey all local ordinances and state and national laws.
Comply strictly with any additional requirements that may be imposed by the Court or your Probation Officer during the term of your probation.
It is unlawful for any person convicted of a felony to possess, use or receive any firearms, Title 7, Public Law 90-618, Gun Control Act of 1968.
Participate in a Chemical Health Assessment at I.B.C.A. and follow through with all recommendations.

Enter into and successfully complete any treatment program referred to and any and all aftercare as directed by Court Services if so recommended.
Submit to random urinalysis, as directed by Court Services.
No use of any mood-altering substances.
Participate in assessment at I.B.C.A. for assistance in educational/vocational planning and follow through with all recommendations.

Should defendant violate any of the conditions herein specified, sentence may be imposed.

P.O.: Doreen N. Robinson *DATED:* May, 1990

Telephone: 348-8080

ROBERT H. LYNN
Judge of the District Court

APPENDIX B

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

Court No. 89067687

STATE OF MINNESOTA
Plaintiff,

- vs -

TIMOTHY EUGENE DICKERSON,
Defendant

REPORT OF THE DEPARTMENT OF COURT SERVICES AND ORDER FOR DEFENDANT'S ARREST, DETENTION AND SUMMARY HEARING

REPORT TO THE COURT: NOTICE TO DEFENDANT:

Whereas, defendant, TIMOTHY EUGENE DICKERSON, *who was heretofore on* May 9, 1990, *duly sentenced for the crime of* CONTROLLED SUBSTANCE CRIME 5TH DEGREE POSSESSION *and placed on probation to the Department of Court Services for a period of* two years *pursuant to the Order of the Honorable* ROBERT H. LYNN, *Judge of District Court, whereby* imposition under 152.18 *of sentence was stayed and defendant being now on probation to the Department of Court Services, and* _____

It has been made to appear to the satisfaction of the Department of Court Services that defendant has violated the terms of this probation in the following particulars:

The defendant tested positive for cocaine on 9-26-90.

THEREFORE, pursuant to Minnesota Statutes, Chapter 609, Section 609.14, the alleged violations are herein reported to the Court for such action as is deemed just and proper.

DATED: October 3, 1990

Approved by _____
CAROL A. SKRADSKI, *Corrections Unit Supervisor*

_____
DOREEN N. ROBINSON (348-8080) Probation Officer

ORDER OF THE COURT

It appearing from the foregoing there is a factual basis to believe that defendant has violated the terms and conditions of probation,

IT IS HEREBY ORDERED that the sheriff forthwith apprehend and take into custody said defendant and bring him before this Court to abide the further Order of this Court, and that a copy of the foregoing Report and of this Order be served on defendant upon execution of this Order.

IT IS FURTHER ORDERED that the stay of imposition under 152.18 *of sentence granted in the above-entitled matter be and the same is hereby revoked, and the*

probation time will be tolled until further order of this Court.

DATED: October 5, 1990
WARRANT TO BE EXECUTED OUT OF STATE:

NO____ YES____

ROBERT H. LYNN
Judge of District Court

APPENDIX C

Constitutional Provisions

Article III, §2, of the United States Constitution:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties, made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between citizens of different States,--between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall be appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the

Trial shall be at such Place or Places as the Congress may by Law have directed.

APPENDIX D

United States Sentencing Guidelines Provisions

U.S.S.G. §4A1.1:

Criminal History Category

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Page A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a

sentence. If 2 points are added for item (d), add only 1 point for this item.

(f) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was considered related to another sentence resulting from a conviction of a crime of violence, up to a total of 3 points for this item. *Provided*, that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion.

U.S.S.G. §4A1.a(c), Commentary 3:

§4A1.1(c). One point is added for each prior sentence not counted under §4A1.1(a) or (b). A maximum of four points may be counted under this item. The term "prior sentence" is defined at §4A1.2(a).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. See §4A1.2(e).

An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if imposed within five years of the defendant's commencement of the current offense. See §4A1.2(d).

Sentences for certain specified non-felony offenses are counted only if they meet certain requirements. See §4A1.2(c)(1).

Sentences for certain specified non-felony offenses are never counted. See §4A1.2(c)(2).

A diversionary disposition is counted only where there is a finding or admission of guilt in a judicial proceeding. See §4A1.2(f).

A sentence for a foreign conviction, a tribal court conviction, an expunged conviction, or an invalid conviction, is not counted. See §4A1.2(h),(i),(j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court martial. See §4A1.2(g).

U.S.S.G. §4A1.2(f):

Diversionary Dispositions

Diversion from the judicial process without a finding of guilty (e.g., deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of nolo contendere, in a judicial proceeding is counted as a sentence under §4A1.1(c) even if a conviction is not formally entered, except that diversion from juvenile court is not counted.

U.S.S.G. §4A1.2(f), Commentary 9:

> *<u>Diversionary Dispositions</u>: Section 4A1.2(f) requires counting prior adult diversionary dispositions if they involved a judicial determination of guilt or an admission of guilt in open court. This reflects a policy that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency.*

No. 91-2019

In the Supreme Court of the United States

October Term, 1991

STATE OF MINNESOTA,

Petitioner,

vs.

TIMOTHY E. DICKERSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

RESPONDENT'S RULE 15.7 SUPPLEMENTAL BRIEF IN RESPONSE TO PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

Cases:

Statutes/Rules:

Respondent Timothy E. Dickerson submits this Supplemental Brief, pursuant to this Court's Rule 15.7, in response to Petitioner's Reply Brief. Petitioner's Reply Brief contains significant misstatements of Minnesota law, and misinterprets the arguments made in Respondent's Brief in Opposition.

1. The Operation of Minn. Stats. § 152.18, § 299C.11

In its attempt to show that this case is not moot, Petitioner claims in its Reply Brief that broad expungement relief under Minn. Stat. § 299C.11 is not available to defendants whose prosecutions have been deferred and dismissed, under Minn. Stat. § 152.18 and otherwise. Reply Brief for

Petitioner at 4. Petitioner cites City of St. Paul v. Froysland, 246 N.W.2d 435 (1976) in support of this proposition.

City of St. Paul v. Froysland, however, involved a guilty plea and a judgment of conviction which was followed by a deferred sentence. By contrast, the trial court in this case found that Respondent had committed the charged offense after a stipulated trial, and then, pursuant to Minn. Stat. § 152.18, deferred further proceedings *without* a judgment of conviction.

In other words, Froysland involved a conviction with a deferred *sentence*. The present case involves a deferred *prosecution*, under a different statute, resulting in neither a conviction nor a sentence.

City of St. Paul v. Froysland and subsequent Minnesota decisions indeed stand for the proposition that expungement relief under Minn. Stat. § 299C.11 may not be available to a defendant who was formally convicted of a crime, but that is not the case here.

Petitioner's claim that expungement relief is not available to defendants whose prosecutions have been deferred and dismissed under Minn. Stat. § 152.18 is belied by both the language of the statute and by long-time practice in the Hennepin County District Court. The fact of the matter is that expungement motions under Minn. Stat. § 299C.11 are routinely brought on behalf of defendants treated under Minn. Stat.

§ 152.18, and granted.[1] In all of the cases cited in footnote 1, the Hennepin County Attorney *approved* the expungement relief; in fact, in one of those cases, the Hennepin County Attorney who approved the expungement was counsel for Petitioner in this Court, the author of Petitioner's Reply Brief.[2]

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1. The cases which follow are expungements of prosecutions under Minn. Stat. § 152.18 granted under Minn. Stat. § 299C.11 just in the last two years and are cases in which the undersigned was counsel of record. Because the requested relief was granted, they are identified by initials only. State v. D.E.A., Hennepin County District Court File Nos. 95056 (87902653); State v. J.H.A., Hennepin County District Court File Nos. 97145-02 (88901381); State v. A.P., Hennepin County District Court File Nos. 10143 (89900165).

2. State v. A.P., Hennepin County District Court File Nos. 10143 (89900165).

2. Adverse Collateral Consequences

Petitioner claims in its Reply Brief that, notwithstanding dismissal of this case under Minn. Stat. § 152.18, the State of Minnesota will be permitted to impose adverse collateral consequences upon Respondent in the future if he is again arrested. Reply Brief for Petitioner at 2-3, 6-7. Relying upon this Court's statement in Pennsylvania v. Mimms, 434 U.S. 106, 108 n.3 (1977), Petitioner claims that the proceedings before the trial court "will be relevant to both the availability of probation and the length of sentences in future criminal proceedings . . . ." Reply Brief for Petitioner at 6.

This argument, however, ignores the fact that Minnesota law requires that a

prior prosecution result in a *conviction* before it may be used to preclude probation as a sentencing option. Several sections of Minnesota's controlled substances laws provide that probation is not available for a second controlled substance conviction. *See* Minn. Stats. § 152.021, subd. 3(b); § 152.022, subd. 3(b); § 152.023, subd. 3(b); § 152.024, subd. 3(b); § 152.025, subd. 3(b). All of those provisions, however, require a prior *conviction*. *See* Minn. Stat. § 152.01, subd. 16a.

The same is true for Minnesota's sentencing-term provisions. The Minnesota Sentencing Guidelines establish a system which determines felony sentences based upon a number of factors, one of which is the number of

prior *convictions*. The Guidelines in that regard state:

> [T]he offender is assigned a particular weight for every felony *conviction* for which a felony sentence was stayed or imposed before the current sentencing or for which a stay of imposition of sentence was given before the current sentencing.

Minnesota Sentencing Guidelines, § II.B.1 (emphasis supplied).

Since there was no conviction in this case, there is no possibility that adverse collateral consequences relating to this proceeding may be imposed in the future upon Respondent. The State of Minnesota's Petition should therefore be denied as moot. There is "no possibility . . . [of] collateral legal consequences . . . ." in this case. Sibron v. New York, 392 U.S. 40, 57 (1968).

3. Mootness Analysis

The principal distinction between the authorities Petitioner cites in its Reply Brief and this case is that this case was *dismissed* pursuant to statute *without an adjudication of guilt*. The dismissal occurred after the Minnesota Supreme Court's decision, but was wholly unrelated to that court's decision.

At the time Respondent Dickerson filed his appeal with the Minnesota appellate courts, his appeal was not moot. He was still under the supervision of the trial court, and his deferred disposition could have been rescinded had he failed to comply with the trial court's conditions. The reason why he made reference to State v. Goodrich, 256 N.W.2d 506 (Minn. 1977) in

his state-court appeal was not to defeat a mootness claim, but, rather, to anticipate an appealability challenge. His citation to State v. Goodrich below does not vitiate his mootness objection to the State of Minnesota's Petition before this Court.

Respectfully submitted,

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August 18, 1992

No. 91-2019

IN THE

Supreme Court of the United States

October Term 1992

STATE OF MINNESOTA,

Petitioner,

vs.

TIMOTHY DICKERSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

MOTION FOR LEAVE TO FILE BRIEF
AND
BRIEF OF AMICI CURIAE,

MINNESOTA COUNTY ATTORNEYS ASSOCIATION,
Joined By
NATIONAL DISTRICT ATTORNEYS ASSOCIATION, THE STATES OF ALASKA, DELAWARE, FLORIDA, ILLINOIS, INDIANA, THE COMMONWEALTH OF KENTUCKY, THE STATES OF MISSOURI, MONTANA, NEW JERSEY, NORTH CAROLINA, THE COMMONWEALTHS OF PENNSYLVANIA, PUERTO RICO, THE STATES OF SOUTH CAROLINA,

VERMONT AND WYOMING,* HAWAII PROSECUTING ATTORNEYS ASSOCIATION, INDIANA PROSECUTING ATTORNEYS COUNCIL, KANSAS COUNTY AND DISTRICT ATTORNEYS ASSOCIATION, LOUISIANA DISTRICT ATTORNEYS ASSOCIATION, MASSACHUSETTS DISTRICT ATTORNEYS ASSOCIATION, NEW MEXICO DISTRICT ATTORNEYS ASSOCIATION, PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION, OREGON DISTRICT ATTORNEYS ASSOCIATION, SOUTH CAROLINA COMMISSION ON PROSECUTION COORDINATION, SOUTH DAKOTA STATE'S ATTORNEYS ASSOCIATION, VIRGINIA ASSOCIATION OF COMMONWEALTH'S ATTORNEYS, WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS,
IN SUPPORT OF PETITIONER STATE OF MINNESOTA

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List of Counsel Continued on Back Pages

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TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. 91-2019

STATE OF MINNESOTA,

PETITIONER,

vs.

TIMOTHY DICKERSON,

RESPONDENT.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Minnesota County Attorney's Association ("MCAA"), National District Attorneys Association, Inc. ("NDAA"), Hawaii Prosecuting Attorneys Association, Indiana

Prosecuting Attorneys Council, Kansas County and District Attorneys Association, Louisiana District Attorneys Association, Massachusetts District Attorneys Association, New Mexico District Attorneys Association, Pennsylvania District Attorneys Association, Oregon District Attorneys Association, South Carolina Commission on Prosecution Coordination, South Dakota State's Attorneys Association, Virginia Association of Commonwealth's Attorneys, and the Washington Association of Prosecuting Attorneys respectfully move for leave to file the attached brief as amici curiae. States sponsored by their attorney general according to Rule 37.5 have joined in this brief. In support of this Motion, the above-named Movants would show the court as follows:

1. Interest of Amici Curiae. MCAA represents all the county attorneys in the State of Minnesota. By law, county attorneys

have the responsibility of prosecuting all those accused of committing serious criminal offenses in their jurisdiction. MCAA has submitted numerous amicus curiae briefs to the Minnesota Supreme Court and has joined in amicus briefs filed in this Court.

NDAA is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication and amicus curiae activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all our citizens.

Other movants perfo[illegible]imilar functions in their respective States.

2. Specific Interest in the Case at Bar. Movants' members are continuously engaged in the prosecution of criminal cases, including many bases presenting issues

related to those in the case at bar. Their statutory obligations are directly affected by decisions under the Fourth Amendment precluding the introduction of evidence. Since Movants' members appear in trial courts to represent the states in these cases, they may be able to assist the Court in developing the issues fully.

3. Purpose of Amicus Curiae Brief. Movants' purpose, in this brief, is to analyze the case authority in ways that are not present in other briefs. Amici Curiae have communicated with counsel for Petitioner in an effort to avoid undue duplication. It is believed that this brief argues the issues in a manner different from that in Petitioner's Petition for Writ of Certiorari.

4. Public Importance of the Issues Addressed Here. The decision of the Minnesota Supreme Court in State v. Dickerson adversely and critically impacts the ability

of law enforcement personnel and prosecutors effectively to counter trafficking in dangerous drugs. Frequently, police officers so engaged are genuinely in fear of their lives and must frisk individuals they detain on suspicion of drug involvement. When they discover drugs in the course of legitimate frisks they must have authority to seize -- and get off the street -- those drugs.

A hypertechnical decision like that in Dickerson deters effective drug enforcement to the detriment of the public interest.

5. Requests for Consent. The consent of the Petitioner to the filing of this brief has been requested and granted. The consent of Respondent has been requested and refused. Letters from the counsel of record of both parties are appended. This Motion is therefore filed in accordance with the Rules of this Court.

FOR THESE REASONS, movants pray that they be granted leave to file the attached brief as amici curiae.

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x

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. 91-2019

STATE OF MINNESOTA,

PETITIONER,

vs.

TIMOTHY DICKERSON,

RESPONDENT.

BRIEF OF AMICI CURIAE

INTEREST OF AMICI

Amici are prosecutor associations and States that support the Petitioner's position and urge this Court to grant a Writ of

Certiorari. Amici interest in this case concerns the effect the misapplication of the Fourth Amendment in this case will have upon the equitable administration of justice nationwide and upon prosecutors' ability to enforce the law.

The decision below upsets the balance maintained consistently since this Court's decision in Terry v. Ohio, 392 U.S. 1 (1968), between the officer's right to investigate in safety and the suspect's right to liberty and privacy.

At issue is, simply, whether the officer can rely on information derived from all five of his acutely trained senses and take action to the extent that the Fourth Amendment permits.

QUESTION PRESENTED

Whether a police officer who with justification has stopped and is frisking a person he comes upon in suspicious circumstances, may remove and seize an object he immediately identifies as contraband by feeling it through the person's outer clothing in the course of the frisk without violating the Fourth Amendment to the United States Constitution.

STATEMENT OF FACTS[1]

At 8:15 p.m. on November 9, 1989, Officer Vernon Ross of the Minneapolis Police Department was patrolling with his partner in a marked squad car on the city's north side. Ross was at the time a 14-year veteran of the Department, having spent 11-1/2 of those years on the north side and having had

---

1. The facts are derived from the majority and dissenting opinions in the Minnesota Supreme Court.

extensive recent experience working on cases involving narcotics and weapons.

As they drove southbound on Morgan Avenue South, the officers saw a man, later identified as respondent Timothy Eugene Dickerson, leaving a three-story, 12-unit apartment building which was a notorious "crack house" that "goes 24 hours a day." It had been the subject of much complaint from the community, including "aldermanic complaint," and had been raided by police on "numerous" occasions, with drugs and weapons, including knives, handguns and sawed-off shotguns, being seized.

As respondent walked from the front entrance of the building toward the front sidewalk, he looked up and made eye contact with the officers, then made an "abrupt . . . strange and suspicious" change in direction, apparently "just because he saw a police car." As respondent headed toward the alley

instead of toward the street, the officers drove into the alley and stopped him.

The officer had never seen respondent before and knew of no criminal activity by him.

While subjecting respondent to a pat-down search of his outer clothing, a thin nylon jacket, Officer Ross felt a lump in respondent's jacket pocket. With the clothing between his hands and the object, Ross "examined it with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane." Ross had "felt [crack] before in clothing" -- approximately 50 to 75 times -- and "was absolutely sure that's what it was, or I would have left it there."

To this point, Ross had been "just patting the outside." Upon detecting the presence of the lump which he was certain was crack cocaine, he reached in and seized the

substance, which was in fact crack cocaine, and arrested respondent.

SUMMARY OF ARGUMENT

When an experienced police officer is authorized to frisk a person whose behavior he is investigating, contraband felt and identified may be removed and seized. Stated differently, the sense of touch, with other information that precipitated the investigation, has yielded the officer probable cause to arrest the suspect and seize the contraband. Exigent circumstances exist rendering impossible the officer's securing of a warrant.

ARGUMENT

The Fourth Amendment to the United States Constitution proscribes only such searches and seizures as are unreasonable. This Court's vital decision in Terry v. Ohio, 392

U.S. 1, 20-21 (1968) holds that "there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' Camera v. Municipal Court, 387 U.S. 523, 534-535, 536-537, 87 S.Ct. 1727, 1735, 18 L.Ed.2d 930 (1967). And in justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."

In short, the extent of intrusion into the protected liberty and privacy of a person must be commensurate to the suspicious circumstances occasioning it.

In the instant case, the right of Officer Ross to stop respondent and to frisk him for weapons is not at issue; all Courts that have considered the matter agree that the

officer's articulable suspicions warrant that degree of intrusion. The point in controversy is whether the extent of the intrusion is excessive or whether it "was reasonably related in scope to the circumstances which justified the interference in the first place." [Terry v. Ohio, 392 U.S. at 20].

What evidence the opinion of the court in Terry provides suggests that a frisk limited to the outer clothing of the suspect will generally pass constitutional muster.

> "The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.
>
> "The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then

> he merely reached for and removed the guns. He did not invade Katz' person beyond the outer surfaces of his clothes, since he discovered nothing in his pat-down which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find. [392 U.S. 29-30].

* * * *

> "Each case of this sort will, of course, have to be decided on its own facts. We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." [392 U.S. at 30]. [Emphasis added]

In the instant case, Office Ross was engaged in a properly limited frisk of the outer surface of respondent's thin nylon

jacket pocket when he felt a lump which, from its size and the way it slid, he knew to be a lump of crack cocaine in cellophane.

> "If, while conducting a legitimate Terry search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances. Coolidge v, New Hampshire, 403 U.S. 443, 465, 91 S.Ct. 2022, 2037, 29 L.Ed.2d 564 (1971); Michigan v. Tyler, 436 U.S. 499, 509, 98 S.Ct. 1942, 1949, 56 L.Ed.2d 486 (1978); Texas v. Brown, 460 U.S. at 739, 103 S.Ct., at 1541 (plurality opinion by Rehnquist, J.); id.,at 746, 103 S.Ct. at 1545 (Powell, J., concurring in the judgment).

Michigan v. Long, 463 U.S. at 1050.

Professor LaFave recognizes that

> "Assuming the object discovered in the pat-down does not feel like a weapon, this only means that a further search may not be justified under a Terry analysis. There remains the possibility that the feel of the object, together with other suspicious circumstances, will amount to probable cause that the object is contraband or some other item subject to seizure, in which case there may be a further search based upon that probable cause."[2]

This Court's decisions, ignored in the Minnesota Supreme Court's holding in this case, direct that under the Fourth Amendment deference should be paid to the officers' "training and experience to draw inferences and make deductions that might well elude an untrained person. United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 695 66 L.Ed.2d 621 (1981)." Texas v. Brown, 460 U.S. 730, 746 (1983) (officer knew tied off balloons found in car contained contraband; this satisfies "immediately apparent" test of Coolidge v. New Hampshire, 403 U.S. 443 (1971)).

As the dissenting opinion in the Minnesota Supreme Court concludes, the Court's majority had "rather cavalierly" questioned Officer Ross' capacity to make the

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2. [Footnote omitted] LaFave, Search and Seizure, (2nd ed. 1987) (9.4(c) at 524.

"absolutely sure" identification he made, doubting the credibility of a police officer of fourteen years experience -- much of it on the very streets he was then patrolling.

Contrary to the view expressed in the majority opinion in the Minnesota Supreme court, it does not weigh against Officer Ross that he directed his partner to stop the car "so he could search the defendant for weapons and drugs." This was said in light of the facts that respondent was coming from a notorious around-the-clock crack house. Given his training and experience, Officer Ross meant he would search if his understanding of the Fourth Amendment allowed it.

There is no longer a requirement that plain view observations need be inadvertent. Horton v. California, ___ U.S. ___, 110 S.Ct. 2301, 2308-10 (1990). It suffices if the officer is legitimately in the position from

which he can view the object and the incriminating nature is "immediately apparent."[3] Indeed, the qualification that the object's status as contraband be "immediately apparent" states it too strongly because the test is one of probable cause to seize, not absolute certainty.[4] The officers' decision to seize may be based on contemporaneous observations together with other data previously available to them.

It makes no sense even to suggest, as did the majority in the Minnesota Supreme Court, that procuring a warrant be required

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3. Compare Coolidge v. New Hampshire, 403 U.S. 443 (1971) with Arizona v. Hicks, 480 U.S. 321 (1987).

4. "Decisions by this Court since Coolidge indicate that the use of the phrase 'immediately apparent' was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory nature of evidence is necessary for an application of the 'plain view' doctrine."

Texas v. Brown, 460 U.S. at 743; Colorado v. Bannister, 449 U.S. 1, 3-4 (1980).

on these facts prior to seizure, because the suspect will long be gone at the time of its issuance. Were the officer to seize the person of the suspect while getting a warrant, a far greater intrusion into his liberty would be worked than any privacy right compromised by the seizure of the contraband identified in the frisk. Texas v. Brown, 460 U.S. 730, 739 (1983).

In addition, it is difficult to see how, or in what significant way, respondent's liberty and privacy were interfered with by Officer Ross' sliding the object he felt in respondent's thin nylon jacket pocket, beyond what in an admittedly valid frisk he had already suffered.

A frisk entails "a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons . . . performed by a policeman while the citizen stands helpless, perhaps

facing a wall with his [other] hands raised . . ." Terry v. Ohio, 392 U.S. at 16-17.

> The officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and the area about the testicles, and entire surface of the legs down to the feet.

LaFave, Search and Seizure § 9.4(b) at p. 519, quoting Brian Martin, Searching and Disarming Criminals, 45 J. Crim. L. C. P. S. 481 (1954).

The additional intrusion on respondent's privacy of the officer's sliding his hand on the outside over the object felt in respondent's jacket pocket is de minimus.

Given the rapid time sequence from initiation of the frisk to identification of the crack cocaine, it may be inferred that the officers' determination the pocket didn't contain weapons but did contain contraband was one course of conduct; the same acts

performed within seconds essentially yielded both conclusions.

This court has held that authorities may use additional techniques in addition to a frisk to protect their safety without impermissibly extending the intrusion into the suspect's protected liberty or privacy. [Requiring motorist to get out of car, Pennsylvania v. Mimms, 934 U.S. 106 (1970 (search of car's interior for weapons); Adams v. Williams, 407 U.S. 143 (1972); Michigan v. Long, 463 U.S. 1032 (1983).

That Officer Ross made the ultimate determination that respondent had contraband in his pocket through his sense of feel and not one of the other four senses is without logical -- hence constitutional -- significance. By definition, the significant information derived from a frisk or pat-down is made available by the sense of touch.

It makes no sense to conclude that, regardless of circumstances, "the sense of touch is inherently less immediate and less reliable than the sense of sight." In a darkened room or on a street at night, an officer is well advised to use touch rather than sight to determine whether a suspect has capacity to do him harm.

Equally subject to question is the bald assertion that "the sense of touch is far more intrusive into . . . personal privacy" than seeing what the suspect has within his pockets.

This Court has recognized that probable cause to seize contraband can be based on the sense of smell of a police officer whose experience permits him to identify what he is smelling. Johnson v. United States, 333 U.S. 10 (1948); United States v. Johns, 469 U.S. 478 (1985). "Feel" is certainly as available and as reliable as "smell."

This Court "has not specifically adopted or directly addressed the plain touch corollary to the plain view doctrine. . .",[5] but the Petition for Writ of Certiorari cites the relevant cases from which it can be demonstrated that the majority of jurisdictions accept the corollary.[6]

Arrest can, so long as the suspect is not in his home, be made without warrant and evidence seized incident to it be received in evidence; it isn't of constitutional significance that the formal arrest follows the search so long as the information gleaned in the search is not used to justify the arrest. In addition, the officer knew respondent had just come from a "crack house"

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5. Holtz, The "Plain Touch" corrollary: A Natural and Foreseeable Consequence of the Plain View Doctrine, 95 Dickinson Law Rev. 521 (1991).

6. Petition for Writ of Certiorari at pp. 15-21; See also State v. Alamont, 577 A.2d 665 (R.I. 1990) (uphold and apply plan touch corollary); State v. Washington, 134 Wis.2d 108, 396 N.W.2d 156, 161-162 (1986).

that "goes 24 hours a day" and saw respondent change his direction abruptly and suspiciously after making eye contact with the officer. These factors together produced Officer Ross' certain identification of the contraband
-- ample to constitute probable cause to arrest and to seize the crack cocaine incident thereto. See Cupp v. Murphy, 412 U.S. 291 (1973) (search on probable cause before arrest but with exigent circumstances).

Vigilance is necessary to deal with the case where a frisk is continued or intensified without justification after it is determined that the detainee is not armed and thus not dangerous. This is not that case.

CONCLUSION

For the reasons stated, amicus prays the court grant certiorari in this matter and reverse the erring Federal constitutional decision made in the State Court.

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No. 91-2019

In the Supreme Court of the United States

October Term, 1992

STATE OF MINNESOTA,

Petitioner,

vs.

TIMOTHY DICKERSON,

Respondent.

ON WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

JOINT APPENDIX

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PETITION FOR CERTIORARI DOCKETED JUNE 17, 1992
CERTIOARI GRANTED OCTOBER 5, 1992

TABLE OF CONTENTS

The following opinions, decisions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for a Writ of Certiorari:

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

December 28, 1989 - A criminal complaint was filed in Hennepin County District Court (hereinafter District Court), Minneapolis, Minnesota, charging Defendant with Possession of a Controlled Substance in the Fifth Degree.

January 31, 1990 - Defendant filed Notice of Motion and Motion to Dismiss for Lack of Probable Cause.

February 1, 1990 - State of Minnesota (hereinafter State) filed State's Memorandum in Opposition to Defendant's Motion to Dismiss.

February 20, 1990 - Pretrial evidentiary hearing held on Defendant's Motion to Dismiss for Lack of Probable Cause.

March 1, 1990 - State filed State's Supplementary Memorandum Opposing Defendant's Motion to Dismiss.

March 2, 1990 - Defendant filed Supplemental Memorandum in Support of the Motion to Dismiss.

March 8, 1990 - The District Court entered Findings of Fact, Conclusions of Law and an Order denying Defendant's motion to suppress evidence and to dismiss for lack of probable cause. The court found probable cause to believe that Defendant committed a crime.

March 13, 1990 - State and Defendant agreed to enter into a pre-plea investigation and submitted the case before the District Court for trial on stipulated facts.

May 9, 1990 - The District Court found Defendant guilty of Possession of a Controlled Substance in the Fifth Degree, deferred a finding of guilt and placed Defendant on probation.

June 4, 1990 - The District Court entered an order, dated May 29, 1990, placing Defendant on probation until May 8, 1992, and deferred any adjudication of guilt pursuant to Minn. Stat. § 152.18 (1989).

August 7, 1990 - Defendant filed Notice of Appeal to Court of Appeals in the Minnesota Court of Appeals (hereinafter Court of Appeals).

October 9, 1990 - Defendant filed Appellant's Brief with the Court of Appeals.

November 27, 1990 - State filed Respondent's Brief with the Court of Appeals.

December 11, 1990 - Defendant filed Appellant's Reply Brief with the Court of Appeals.

January 24, 1991 - Oral argument held before the Court of Appeals.

April 30, 1991 - The Court of Appeals entered a decision which reversed the District Court and found that the officer's pat search of Dickerson exceeded constitutional parameters.

May 30, 1991 - State filed a Petition for Review in the Minnesota Supreme Court (hereinafter Supreme Court) seeking reversal of the Court of Appeals' decision.

June 24, 1991 - Defendant filed a Response to State's Petition for Review of Decision of the Court of Appeals with the Supreme Court.

June 25, 1991 - The Minnesota County Attorneys Association filed a Motion to File an Amicus Brief.

July 24, 1991 - The Supreme Court entered an order granting the State's Petition for Review and denying the Minnesota County Attorneys Association's Motion to File an Amicus Brief.

March 20, 1992 - The Supreme Court entered a decision which affirmed the Court of Appeals' decision to reverse the District Court.

May 1, 1992 - The Supreme Court entered a judgment reversing the District Court judgment and sentence in accordance with the opinion.

May 6, 1992 - The District Court entered an Order Discharging Defendant from Supervision and Dismissing Complaint.

October 16, 1992 - The District Court entered an order Correcting Trial Court Record Pursuant to Minn. R. Civ. App. P. 110.05.

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District

COMPLAINT AND FELONY WARRANT

No. 89-067687

CCT	SECTION/Subdivision
1	§152.025, 2(1), 3(a)

STATE OF MINNESOTA,

Plaintiff,

vs.

TIMOTHY EUGENE DICKERSON,
Date of Birth 04-24-66

Defendant.

COMPLAINT

The Complainant, being duly sworn, makes complaint to the above-named Court and states that there is probable cause to believe that the Defendant committed the following offense(s). The complainant states that the following facts establish PROBABLE CAUSE:

Officer Pete Jackson of the Minneapolis Police Department says that he has investigated this case by reviewing the reports of other officers and by personally interviewing witnesses, and in doing so, has learned these facts:

On November 9, 1989, Officers Rose and B.S. Johnson were patrolling near 1010 Morgan Avenue North, Minneapolis, Hennepin County, Minnesota, a residence known to Minneapolis police as a "crack house". Numerous citizen complaints have been received by the police department concerning continued drug dealing at this residence. At approximately 10:15 p.m., officers saw a man, subsequently identified as defendant herein, TIMOTHY EUGENE DICKERSON, leave that house. He was walking towards the sidewalk when he looked at the squad car, changed direction and walked towards the alley of the house.

Officers stopped him and did a pat-frisk for weapons. While patting the left side of his body, Officer Rose felt a small lump in the left top nylon jacket pocket. Based on Officer Rose's experience, he knew that this lump felt like a rock of "crack" such as he had recovered during the course of searches. Officer Rose removed from the pocket a plastic wrapped object which appeared to be a "rock" of "crack/cocaine".

Minneapolis city chemist Dawn Speier says that the "rock" did indeed consist of the Schedule II Narcotic Controlled Substance "crack/cocaine", with a weight of .20 grams. After Miranda, defendant said that the crack did not belong to him, but that he was buying it for someone else.

Defendant is not in custody.

OFFENSE

Controlled Substance Crime Fifth Degree-Possession
MINN. STAT. 1989, §152.025, SUBD. 2(1), SUBD. 3(a)
PENALTY: 0-5 YEARS AND/OR $10,000

That on or about the 9th day of November, 1989, in Hennepin County, Minnesota, TIMOTHY EUGENE DICKERSON unlawfully possessed one or more mixtures containing a Schedule I, II, III, or IV controlled substance, to-wit: crack/cocaine.

THEREFORE, Complainant requests that said Defendant, subject to bail or conditions of release be:
(1) arrested or that other lawful steps be taken to obtain defendant's appearance in court; or
(2) detained, if already in custody, pending further proceedings;
and that said Defendant otherwise be dealt with according to law.
COMPLAINANT'S NAME:
PETE JACKSON /s/ PETER JACKSON
Being duly authorized to prosecute the offense(s) charged I hereby approve this Complaint.
DATE: DECEMBER 19, 1989
PROSECUTING ATTORNEY'S SIGNATURE:
/s/ CHARLES F. SWEETLAND
PROSECUTING ATTORNEY NAME/TITLE:
GAIL S. BAEZ, #40605
ASSISTANT COUNTY ATTORNEY
ADDRESS/TELEPHONE:
C2100 GOVERNMENT CENTER, 348-8595

FINDING OF PROBABLE CAUSE

From the above sworn facts, and any supporting affidavits or supplemental sworn testimony, I, the Issuing Officer, have determined that probable cause exists to support, subject to bail or conditions of release where applicable, Defendant(s) arrest or other lawful steps be taken to obtain Defendant(s) appearance in Court, or his detention, if already in custody, pending further proceedings. The Defendant(s) is/are thereof charged with the above-stated offense.

WARRANT

EXECUTE IN MINNESOTA ONLY

TO the sheriff of the above-named county; or other person authorized to execute this WARRANT; I hereby order, in the name of the State of Minnesota, that the above-named Defendant(s) be apprehended and arrested without delay and brought promptly before the above-named Court (if in session, and if not, before a Judge or Judicial Officer of such Court without unnecessary delay, and in any event not later than 36 hours after the arrest or as soon thereafter as such Judge or Judicial Officer is available) to be dealt with according to law.

ORDER OF DETENTION

Since the above-named Defendant(s) is/are already in custody;

I hereby order; subject to bail or conditions of release, that the above-named Defendant(s) continue to be detained pending further proceedings.

Bail: $5,000

This COMPLAINT - WARRANT, was sworn to subscribed before, and issued by the undersigned authorized Issuing Judicial Officer this 28th *day of* December, 1989

JUDICIAL OFFICER:

/s/ JONATHAN LEBEDOFF

Title: Judge of the District Court

RETURN OF SERVICE

I hereby Certify and Return that I have served a copy of this COMPLAINT - SUMMONS, WARRANT, ORDER OF DETENTION upon the Defendant(s) herein-named.

Signature of Authorized Service Agent:

/s/ C.R. MADRON 139

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District
Felony Division

NOTICE OF MOTION AND MOTION TO DISMISS FOR LACK OF PROBABLE CAUSE

No. 89-067687

STATE OF MINNESOTA,

Plaintiff,

vs.

TIMOTHY EUGENE DICKERSON,

Defendant.

TO: THE COURT; THOMAS L. JOHNSON, HENNEPIN COUNTY ATTORNEY, and GAIL S. BAEZ, ASSISTANT COUNTY ATTORNEY.

NOTICE OF MOTION

PLEASE TAKE NOTICE, that on February 1, 1990 at 11:30 a.m. or as soon thereafter as counsel may be heard, before the Judge of the above-named Court, defendant, by and through his attorney, will move the Court for an order to dismiss for lack of probable cause.

MOTION

Defendant, by and through his counsel moves this Court for an order to dismiss the charge of Fifth Degree Possession of a Controlled Substance for lack of probable cause.

Respectfully submitted,

Office of the Hennepin County Public Defender
WILLIAM R. KENNEDY - Chief Public Defender

By /s/ Scott A. Holdahl
Scott A. Holdahl
Assistant Public Defender
C2200 Government Center
Minneapolis, MN, 55487
Telephone: (612) 348-6701

By /s/ Mary F. Moriarty
Mary F. Moriarty
Assistant Public Defender
C2200 Government Center
Minneapolis, MN 55487
Telephone: (612) 348-7530

DATED: this 29th day of January, 1989 [sic].

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District
Felony Division

NOTICE OF MOTION AND MOTION TO DISMISS FOR LACK OF PROBABLE CAUSE

No. 89-067687

STATE OF MINNESOTA,

Plaintiff,

vs.

TIMOTHY EUGENE DICKERSON,

Defendant.

STATEMENT OF FACTS

On November 9, 1989, Officers Rose and Johnson of the Minneapolis police department patrolled the area near 1010 Morgan Avenue North. Complaints of drug sales in the neighborhood led the police to conclude that the residence located at 1030 Morgan Avenue North was a "crack house". At approximately 10:15 p.m., a man left the house at that address and began to walk toward the sidewalk. The officers allege that when this man saw their squad he changed direction and walked into the alley.

Officers Johnson and Rose did not know the man who emerged from 1030 Morgan Avenue North, but later identified him as Timothy Eugene Dickerson. As Mr.

Dickerson walked into the alley, Officer Johnson told his partner he wanted to stop him. The officers drove into the alley, stopped Mr. Dickerson and ordered him to place his hands on the hood of the car. Mr. Dickerson did as he was told while the officers conducted a search that revealed .20 grams of crack cocaine tightly wrapped in clear paper. Mr. Dickerson was then charged with Fifth Degree Possession of a Controlled Substance in violation of Minn. Stat. §152.025, Subd. 2(l), Subd. 3(a).

ARGUMENT

A defendant may move to dismiss a charge where "there is insufficient showing of probable cause to believe that the defendant committed the offense charged in the complaint . . . " Minn. R. Crim. P. 11.03. In determining whether to dismiss a complaint under Rule 11.03, the trial court does not simply reassess whether or not probable cause existed to warrant the arrest. Under *State v. Florence*, 306 Minn. 442, 239 N.W.2d 892 (1976), the trial court must exercise independent judgment concerning the facts disclosed by the entire record as to whether it is reasonable and fair to require the defendant to stand trial. 306 Minn. at 457.

The issue presented in this case is whether or not probable cause exists to require Mr. Dickerson to stand trial on the charge of Fifth Degree Possession of a Controlled Substance. If the police seized the crack cocaine from Mr. Dickerson in violation of his Fourth Amendment rights, the court must exclude the evidence as fruit of the poisonous tree and dismiss the possession charge for lack of probable cause.

In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968), the United States Supreme Court held

that a police officer may stop an individual on less than probable cause when faced with sufficiently suspicious behavior to warrant further investigation. To justify the intrusion, the police must be able to point to specific and articulable facts which, taken together with rational inferences, would "warrant a man of reasonable caution in the belief that the action taken was appropriate." 392 U.S. at 22, 88 S.Ct. at 1880. See *State v. Goberly* [sic], 366 N.W.2d 600, 602 (Minn. 1985).

The first issue is whether Officers Rose and Johnson articulated facts sufficient to warrant the initial stop of Mr. Dickerson. The court in *State v. Lamar*, 382 N.W.2d 226 (Minn. App. 1986) articulated various factors that may justify an investigatory stop. A court may consider the defendant's criminal history only if the police were aware of this information at the time of the stop. Other factors include whether the defendant is in a place where criminal activities are fostered, whether the defendant made furtive movements, whether the defendant resisted the search, and whether the officer was in "enemy territory" when he encountered the defendant.

In *Lamar*, an undercover officer entered an "afterhours joint" that had been the subject of repeated police raids. When entering the building, the officer recognized the defendant as a convicted felon known to carry a weapon. As the officer approached the entrance to the establishment, the defendant made several furtive movements. The officer conducted a stop and search of the defendant that revealed a gun. The Court of Appeals upheld the stop and search based upon the officer's observations, and the fact that he was in "enemy territory".

The mere fact that a person is in a high crime area does not by itself justify an investigatory stop. In *Brown v. Texas*, 443 U.S. 47, 61 L.Ed.2d 357, 99 S.Ct. 2637

(1979), the police stopped the defendant in an alley known for the high incidence of drug traffic, although they suspected him of no specific misconduct. The United States Supreme Court ruled that the stop was unconstitutional because the police had no reasonable suspicion, based on objective facts, that the defendant was actually involved in criminal activity.

Justice Burger, for a unanimous Court, wrote, "In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference." 61 L.Ed.2d at 363.

It is Officer Johnson's own admission that Mr. Dickerson was stopped simply because he emerged from what the Minneapolis police perceive to be a "crack house". Although Mr. Dickerson changed direction, he made no furtive or suspicious movement. To be sure, Mr. Dickerson cooperated when the officers stopped him in the alley. Unlike the police in *Lamar*. Officers Rose and Johnson had no knowledge of a criminal record, nor did they have information that he might be carrying a weapon. The officers simply had no articulable purpose for stopping Mr. Dickerson other than the fact that he emerged from a "known crack house" in a high crime area. Since this is an improper purpose for an investigatory stop under *Brown*, the court must exclude evidence gained as a result of the search.

Assuming, for the sake of argument, that Officers Rose and Johnson did legally stop Mr. Dickerson, they had no legal right to conduct the frisk that revealed the crack cocaine. Under *Terry*, if a police officer is entitled to make an investigatory stop and has reason to fear for his safety, he may conduct a weapons search. An officer may not routinely frisk, however, he must have reason to believe,

based on articulable facts, that the suspect is armed and presently dangerous to the officer or to others. The Supreme Court's decision in *Terry* seems to imply a two-step approach. First, the officer must identify himself and make reasonable inquiry. If nothing in the initial stages of the encounter serves to dispel his reasonable fear, he is then entitled to frisk.

Officers Rose and Johnson searched Mr. Dickerson without an inquiry of any kind. They searched him immediately following the stops and discovered what was described as a "small lump" in Mr. Dickerson's pocket. This "lump" turned out to be .20 grams of crack. In their reports the officers mention no articulable fear that Mr. Dickerson might be armed, other than the fact that he had emerged from a house in which other people have been arrested carrying weapons. They noticed no bulges or other indication that Mr. Dickerson might be concealing a weapon. When they did conduct what was supposed to be a weapons search they found such a small amount of cocaine it is difficult to imagine that they could have felt a bulge at all.

Even if the stop itself was legal, the search was improper. The court must exclude the fruit of this improper intrusion on Mr. Dickerson's constitutional rights. Without this evidence, there is no probable cause to require Mr. Dickerson to stand trial on the charge of Fifth Degree Possession.

Respectfully submitted,

Office of the Hennepin County Public Defender
WILLIAM R. KENNEDY - Chief Public Defender

By /s/ Scott A. Holdahl
Scott A. Holdahl
Assistant Public Defender
C2200 Government Center
Minneapolis, MN 55487
Telephone: (612) 348-6701

By /s/ Mary F. Moriarty
Mary F. Moriarty
Assistant Public Defender
C2200 Government Center
Minneapolis, MN 55487
Telephone: (612) 348-7530

DATED: this 29th day of January, 1989 [sic].

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District

STATE'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

No. 89-067687

STATE OF MINNESOTA,

Plaintiff,

vs.

TIMOTHY EUGENE DICKERSON,

Defendant.

STATEMENT OF FACTS

On the night of November 9, 1989, police Officers Rose and B.S. Johnson were patrolling near 1010 Morgan Avenue North, a residence known to Minneapolis police as a "crack house". Minneapolis police had received many citizen complaints concerning drug dealing at this residence. At approximately 10:15 p.m., officers saw a man leave the house and walk towards the sidewalk. When the man noticed the squad car, he immediately changed direction and walked towards the alley of the house.

After observing this sudden change in direction, officers stopped the man, later identified as defendant, Timothy Eugene Dickerson, and conducted a pat-frisk for weapons. Officer Rose felt a small lump in the left top

jacket pocket of the defendant. Based on Officer Rose's experience, he knew that the lump felt like a rock of "crack". Officer Rose removed the object which appeared to be a "rock" of "crack/cocaine", wrapped in a clear plastic wrapper.

Minneapolis city chemist Dawn Speier identified the "rock" as .20 grams of "crack/cocaine".

ARGUMENT

I. Police Officers' Observation of Defendant Provided an Articulable Suspicion for Stopping the Defendant.

> To lawfully stop a person for questioning, as distinct from making an arrest, a police officer must be able to point to specific and articulable facts which, together with reasonable inferences from those facts, reasonably warrant the invasion of a citizen's personal security. The intrusion cannot be based on an inarticulate hunch, and must be reasonable in light of the particular circumstances. A police officer may approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest.

State v. Engholm, 290 N.W.2d 780, 783 (Minn. 1980), restating the findings of *Terry v. Ohio*, 392 U.S. 1 (1968). An investigative stop does not require conclusive proof or probable cause. "[A]ll that is required is that the stop be not the product of mere whim, caprice, or idle curiosity." *State v. Giehenrain*, 374 N.W.2d 573 (Minn. App. 1985), quoting *State v. McKinley*, 305 Minn. 297, 232 N.W.2d 906 (1975). All the facts and circumstances, including the

police officer's experience and training, are relevant to the decision to stop or detain an individual. *United States v. Cortez*, 499 U.S. 411, 418-19 (1980).

In the present case, police officers observed the defendant leaving a known "crack house". The defendant immediately changed direction as soon as he noticed the squad car. These facts, combined with the "reasonable inference an experienced police officer could draw therefrom, justifies the minimal intrusion upon defendant's rights." *State v. Baker*, 308 Minn. 204, 241 N.W.2d 476, 477 (1976).

Minnesota courts have upheld stops which were based primarily on a suspect's evasive behavior. In *State v. Gobeley* [sic], 366 N.W.2d 600 (Minn. 1985), police stopped and searched defendant when he made a "90-degree" turn after entering a store which police were searching for stolen property. In *State v. Lamar*, 382 N.W.2d 226, the defendant was searched after making a "quick movement" upon being notified that police were present. The officer testified that it was the "quick movement that focused his attention on the suspect." The Court of Appeals held that "the fact that appellant made this movement must be assessed from the point of view of a trained police officer." *Id.* at 230 (citing *Thomeczek v. Commissioner of Public Safety*, 364 N.W.2d 471, 472 [Minn. App. 1985].

Recently, the Minnesota Supreme Court upheld the conviction of a defendant stopped by a State trooper after defendant immediately pulled his truck into a driveway after making "eye contact" with the trooper. *State v. Johnson*, 444 N.W.2d 824. In *Johnson*, the court specifically rejected a rule adopted by the Court of Appeals that "an evasive act alone, without other indicia of criminal activity or extreme behavior, does not justify an investigatory stop".

Id. at 824 (citing *State v. Johnson*, 439 N.W.2d 400, 403 [Minn. App. 1989]).

In the instant case, defendant's evasive conduct upon seeing the officers and the fact defendant was observed leaving a known crack house provided a reasonable articulate basis for stopping the defendant.

II. The Circumstances Warranted a Protective Weapons Search.

Police may stop a person for questioning if there is a reasonable suspicion that the person is engaged in criminal activity, and this stop may include a weapons frisk if the officer has reason to be concerned about safety. *State v. McKissic*, 415 N.W.2d 341, 344 (Minn. App. 1987).

Weapons including guns are often seized in crack house raids. In fact, officers had previously seized both narcotics and weapons from this particular "crack house". Under the circumstances, it was reasonable for the officers to believe that a weapon might be concealed on the defendant's person. Thus, the officers acted properly in "pat-frisking" the defendant for weapons.

III. Officers had a Legal Right to Discover and Remove the Cocaine Base.

The search in the instant case can be analogized to the frisk upheld in *State v. Alesso*, 328 N.W.2d 685 (Minn. 1982). In *Alesso*, the Minnesota Supreme Court upheld the seizure of a packet of cocaine discovered by the officer during a frisk for weapons. In *Alesso*, the officer saw the defendant trying to conceal something in his pocket. Fearing it might be a weapon, the officer put his hand in defendant's pocket and pulled out a small package. In

upholding the search, the court held, "The act of reaching into the pocket and removing the contents is essentially a single act, so that it is unrealistic to require the officer to re-evaluate the available facts after putting his hand into the pocket." *Id.* at 688 (quoting 3 W. LaFave, *Search and Seizure*, §9.4(d) at page 132 (1978).

The package seized by the officer in *Alesso* was not wrapped in clear plastic. The officer had to open the package to view the contraband. The Court ruled that under the "plain view" seizure rule, if it was "immediately apparent" to the officer that the object removed, although not a weapon, was contraband, then the officer was justified in opening it." *Id.* at 689 (quoting 2 W. LaFave, *Search and Seizure*, §6.7(b) [1978]).

In the present case, the crack/cocaine was wrapped in a clear plastic wrapper. The officers did not even need to unwrap it to see that it contained crack. Once the officers pulled the package out of the defendant's pocket, it was "immediately apparent" to these experienced officers that the package contained a rock of crack/cocaine. Since it was immediately apparent to the officers that the plastic wrapper contained crack/cocaine, under *Alesso* the search and seizure was lawful.

CONCLUSION

The officers' observations of the defendant provided an articulable reason for stopping the defendant. Under the circumstances (defendant was leaving a crack house where many weapons had been seized in the past), a protective weapons search was reasonable. When the officers discovered the package, it was "immediately apparent" that the package contained cocaine. At this point, the officers had a right to seize the substance and arrest the suspect.

For these reasons, the State respectfully requests this Court to deny defendant's motion in all respects.

Dated: February 1, 1990.

Respectfully submitted,

THOMAS L. JOHNSON
Hennepin County Attorney

/s/ Gail S. Baez
Gail S. Baez
Assistant County Attorney
Atty. Reg. No. 40605
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Tom Jamison
Law Clerk, Criminal Div.

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District

STATE'S SUPPLEMENTARY MEMORANDUM OPPOSING DEFENDANT'S MOTION TO DISMISS

No 89-067687

STATE OF MINNESOTA,

Plaintiff,

vs.

TIMOTHY EUGENE DICKERSON,

Defendant.

Under the facts testified in the February 20, 1990, hearing on the above-captioned case, the State asked the court to adopt a "plain feel" doctrine, analogous to the "plain view" doctrine. The State acknowledged that there are no cases directly on point in this jurisdiction, but relies on *State v. Alesso*, 328 N.W.2d 685 (Minn. 1982) as a basis for justifying Officer Rose's removal of the crack baggie from defendant's pocket.

In *Alesso*, defendant had made a movement towards his pocket. The officer quickly brushed defendant's hand aside, reached in and grabbed what was inside the pocket. As soon as the officer pulled out the object, he saw that it was a baggie containing a package made from cigarette wrapper paper, obviously not a weapon. The court held

that the officer was entitled to open the package, notwithstanding the fact that a) the officer could see that it was not a weapon, and b) that the officer opened it because he suspected that the package contained contraband.

The Court noted that the "plain view" doctrine has three requirements: 1) prior justification for an intrusion exists; 2) the evidence must be inadvertently discovered; and 3) the incriminating nature of the object seized must have been readily apparent. The Court held that if it was "immediately apparent" to the officer that the object removed was contraband, then the officer was justified in opening up the package which did indeed contain cocaine.

In the case before the Court, Officer Rose, while conducting a lawful pat search for weapons, felt an object which he knew was crack/cocaine. He knew this based on his years of experience in arrests and searches, including searches of persons where he felt "crack" through clothing. His testimony was unequivocal that the object he had felt was that particular substance. It was "readily apparently [sic]" to Officer rose [sic] that he had discovered "crack/cocaine".

In most other cases, the "immediately apparent" issue relates to what the officer was able to see. In the instant case, sense of touch is involved. Significantly, however, the Court found it was "immediately apparent" to the officer in *Alesso* that the object, wrapped in cigarette paper, inside a baggie, was in fact contraband. It would seem that the officer in *Alesso*, relying on his sense of vision, would have less of an ability to identify an object wrapped in opaque material than Rose had when feeling pieces of crack through this nylon material.

The Washington State case to which the State referred in argument is *State v. Broadnax*, 654 P.2d 96 (Wash. 1982). As noted in the State's argument at the February

20, 1990 hearing, that case can be distinguished. In *Broadnax*, the officer conducting a pat search felt a soft bulge in defendant's pocket. The Court held that the officer simply "could not know", based on the tactile sense alone, that the bulge was a balloon containing heroin. Rejecting the claim that probable cause for arrest on which a search could be based was formulated by touching a soft bulge, the court said "a soft bulge in a shirt pocket is not alone sufficient information to find probable cause to arrest.

In the instant case, the nature of the object Officer Rose felt was not ambiguous, particularly to someone with the experience and background of Officer Rose. He recognized through sense of touch that what he had encountered was contraband, crack/cocaine.

According to the defense, Officer Rose, notwithstanding that he knew he had found crack, was just supposed to walk away from it. Such a result flies in the face of responsible law enforcement and ultimately, common sense. The better rule would be that, assuming the officers' initial stop and pat search was legal, officers to whom it seems "immediately apparent" that they have discovered contraband, are authorized thereby to conduct a search to recover it.

Respectfully submitted,

THOMAS L. JOHNSON
Hennepin County Attorney

Gail S. Baez (40605)
Assistant County Attorney
C-2100 Government Center
Minneapolis, MN 55487
612-348-8595

Dated: March 1, 1990

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District
Felony Division

SUPPLEMENTAL MEMORANDUM

No. 89-067687

STATE OF MINNESOTA,

Plaintiff,

vs.

TIMOTHY EUGENE DICKERSON,

Defendant.

TO: THE COURT; THOMAS L. JOHNSON, HENNEPIN COUNTY ATTORNEY; AND GAIL S. BAEZ, ASSISTANT COUNTY ATTORNEY

This memorandum addresses the issue of whether the rock of cocaine removed from Mr. Dickerson's pocket during a *Terry* frisk is admissible. Assuming, *arguendo*, that the stop and frisk was permissible, Officer Rose exceeded the scope necessary to protect himself and Officer Johnson by disarming a potentially dangerous man.

To support the position that the crack is admissible, the State relies exclusively on *State v. Alesso*, 328 N.W.2d 685 (Minn. 1982). In *Alesso*, the Minnesota Supreme Court upheld the seizure of a packet of cocaine discovered by an officer during a frisk for weapons. The defendant in

Alesso tried to conceal or remove an object in his pocket, leading the officer to fear for his safety. The Court ruled that the officer was justified in grabbing the object if he reasonably suspected that it might be a weapon.

The issue next addressed by the Court was whether the officer was justified in opening the legally seized package. Generally, an officer who removes a container in a weapons frisk is not permitted to open it if it is clear from observation that it is not a weapon and does not contain a weapon. Under the "plain-view" seizure rule, however, an officer may open a package if it is immediately apparent that the object removed is contraband. Since the officer in *Alesso* could see a bindle through the plastic bag, which was in plain view, he justifiably opened the package.

The key to *Alesso* is to understand that the officer was entitled to reach into Alesso's pocket because he thought Alesso was reaching for a weapon. Only after the officer had lawfully removed the package did the "plain-view" seizure rule apply.

The seizure of one rock of crack cocaine from Mr. Dickerson cannot, as the State contends, be analogized to *Alesso*. Officer Rose made no claim that Mr. Dickerson made furtive gestures or other indication that he was reaching for, or concealing, a weapon. The only reason Officer Rose gave for conducting a *Terry* frisk was knowledge that other people arrested during raids at 1030 Morgan Avenue possessed weapons. The "plain-view" doctrine is irrelevant in this case because the issue in *Alesso* was whether the officer could open a lawfully seized container.

During the Rasmussen Hearing on February 20, 1990, the Court questioned whether an officer can seize contraband found during a *Terry* weapons frisk.

In *Sibron v. New York*, 392 U.S.40, 88 S.Ct. 1989, 20 L.Ed.2d 917 (1968), the United States Supreme Court said that an officer must have constitutionally adequate, reasonable grounds before placing a hand on the person of a citizen in search of anything. In the case of a self-protective search for weapons, the officer must be able to point to particular facts from which one could reasonably infer that the individual was armed and dangerous.

The Supreme Court went on the explain that a *Terry* frisk is permissible only if its scope does not exceed what is reasonably necessary to protect the officer:

> Even assuming *arguendo* that there were adequate grounds to search Sibron for weapons, the nature and scope of the search . . . were so clearly unrelated to that justification as to render the heroin inadmissible. The search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Only when he discovered such objects did the officer in *Terry* place his hands in the pockets of the men he searched. 392 U.S. at 65-66, 88 S.Ct. at 1904.

In *State v. Hobart*, 94 Wash.2d 437, 617 P.2d 429 (1980), the Washington Supreme Court applied *Sibron* to a similar fact pattern. Although skeptical, the Court assumed that the officer had reasonable grounds to conclude that the defendant was armed and dangerous. The officer testified that he pat searched the defendant for safety purposes and that he felt two spongy objects in the defendant's shirt pocket. The Court wrote:

However, from his [the officer's] own description of the search which he made, it is evident that its scope was not strictly limited to a search for weapons, but included also an exploration of the possibility that the defendant might be in possession of narcotics. Having discovered "spongy" objects (which could not reasonably be feared as dangerous weapons) in the defendant's pockets, the officer squeezed them, with the obvious purpose of ascertaining whether they had the shape and consistency of balloons commonly used for narcotics. Such a search reaches beyond the scope permitted under the Fourth Amendment, adding to the search for weapons a search for evidence of a crime.

. . .

We are aware of no instance in which the Supreme Court has condoned the use of a "frisk" to search for evidence of an independent crime. All of its pronouncements have made it clear that such a warrantless personal intrusion is justified only to assure the safety of the officer and others. To approve the use of evidence of some offense unrelated to weapons would be to invite the use of weapons' searches as a pretext for unwarranted searches, and thus to severely erode the protection of the Fourth Amendment. Such a step this court is not prepared to take. 94 Wash.2d at 446-47, 617 P.2d at 433-34.

In *State v. Collins*, 139 Ariz. 434, 679 P.2d 80 (Ariz. 1983), the court reversed the defendant's conviction and

held that officers may not seize any and all suspicious items discovered during a *Terry* weapons frisk. Even assuming the *Terry* frisk for weapons was reasonable, the officers' invasion of the defendant's pockets to seize "soft" objects that were obviously not weapons violated the defendant's Fourth Amendment rights. 679 P.2d at 83.

The State of Arizona argued that the seizure of drugs was proper because the police, while feeling for weapons, may seize any other suspicious items. The court rejected this argument and agreed with the defendant that the Fourth Amendment does not have a "plain feel" exception. 679 P.2d at 82.

Officer Rose clearly exceeded the scope of the pat frisk allowed by *Terry*. He testified that he felt a small lump in Mr. Dickerson's pocket that he concluded was crack cocaine. At no time did Officer Rose suspect that the small lump was a weapon. Without suspicion that Mr. Dickerson was armed, Officer Rose had no legal right to unzip the pocket and remove the cocaine. Since the discovery of the cocaine is the product of an illegal search, the evidence should be suppressed.

Officer Rose's intrusion into Mr. Dickerson's pocket exceeded the scope of the *Terry* pat frisk. Minnesota has not adopted the "plain feel" rule, a doctrine that has been rejected by several states, including Arizona. Since the "plain feel" rule deals primarily with packages and containers, it would be inapplicable in this case were it the law in this state.

Respectfully submitted,

Office of the Hennepin County Public Defender
WILLIAM R. KENNEDY - Chief Public Defender

By /s/ Scott A. Holdahl
SCOTT A. HOLDAHL

By /s/ Mary F. Moriarty
MARY F. MORIARTY
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C2200 Government Center
Minneapolis, MN 55487
Telephone: (612) 348-7530

DATED: this 27th day of February, 1990

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District

PROBATION ORDER

No. 89-067687

STATE OF MINNESOTA,

Plaintiff,

vs.

TIMOTHY EUGENE DICKERSON,

Defendant

On May 9, 1990, *the above-named defendant entered a plea of guilty to the crime of* CONTROLLED SUBSTANCE CRIME FIFTH DEGREE - POSSESSION *and thereafter on* May 9, 1990, *defendant was placed on probation, without an adjudication of guilty under provisions of Minnesota Statute 152.18.*

And the Court being of the opinion that by reason of the character of defendant and the circumstances of this case it will be for the best interest of defendant and the best interest of justice that defendant be placed on probation for the period and upon the conditions in this Order hereinafter specified.

NOW THEREFORE, IT IS ORDERED that in accordance with M.S. 152.18 defendant is placed on

probation until May 8, 1992, *and assigned to the Hennepin County Department of Court Services for supervision.*

Said probation is granted, however, upon the express condition defendant shall observe the following order, rules and regulations:

Be truthful to your Probation Officer in all matters.
Keep your Probation Officer informed at all times of your place of residence and employment, and make no change in these without the knowledge and consent of your Probation Officer.
Do not leave the State of Minnesota without the knowledge and consent of your Probation Officer.
Report to your Probation Officer as directed.
Do not incur any financial indebtedness without the knowledge and consent of your Probation Officer.
Obey all local ordinances and state and national laws.
Comply strictly with any additional requirements that may be imposed by the Court or your Probation Officer during the term of your probation.
It is unlawful for any person convicted of a felony to possess, use or receive any firearms, Title 7, Public Law 90-618, Gun Control Act of 1968.

Participate in a Chemical Health Assessment at I.B.C.A. and follow through with all recommendations.
Enter into and successfully complete any treatment program referred to and any and all aftercare as directed by Court Services if so recommended.
Submit to random urinalysis, as directed by Court Services.
No use of any mood-altering substances.

Participate in assessment at I.B.C.A. for assistance in educational/vocational planning and follow through with all recommendations.

Should defendant violate any of the conditions herein specified, sentence may be imposed.

P.O.: /s/ Doreen N. Robinson
DATED: May 29, 1990
Telephone: 348-8080

/s/ Robert H. Lynn
Judge of the District Court

STATE OF MINNESOTA **SUPREME COURT**

JUDGMENT

Appellate Court Case Number C9-90-1780
Trial Court Case Number 89-067687

STATE OF MINNESOTA, petitioner,

Appellant,

vs.

TIMOTHY EUGENE DICKERSON,

Respondent.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment and sentence *of the Court below, herein appealed from, to wit, of the* District *Court within and for the County of* Hennepin *be and the same hereby is* reversed in accordance with the opinion *and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is herein transmitted and made part of the remittitur.*

Dated and signed: FOR THE COURT April 29, 1992
Attest: Frederick K. Grittner
Clerk of the Appellate Courts
By: /s/ D. Sobcinski
Assistant Clerk

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District

ORDER DISCHARGING DEFENDANT FROM SUPERVISION AND DISMISSING COMPLAINT

No. 89-067687

STATE OF MINNESOTA,

Plaintiff,

vs.

TIMOTHY E. DICKERSON,

Defendant

WHEREAS, the above named defendant has been under the supervision of the Bureau of Community Corrections, Felony Probation pursuant to an Order of this Court, and

WHEREAS, said Felony Probation reports that the defendant has made satisfactory progress and recommends his discharge from supervision and,

WHEREAS, the Hennepin County Attorney has recommended that this Court dismiss the Complaint on the file herein.

NOW THEREFORE IT IS HEREBY ORDERED That the defendant be discharged from supervision by the Felony Probation Division, and

IT IS FURTHER ORDERED, That the Complaint on file herein be and the same is hereby dismissed.

By the Court:

/s/ Robert H. Lynn
Judge

DATED: 4/28/92

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District

ORDER CORRECTING TRIAL COURT RECORD PURSUANT TO MINN. R. CIV. APP. P. 110.05

No. 89-067687

STATE OF MINNESOTA,

Plaintiff,

vs.

TIMOTHY EUGENE DICKERSON,

Defendant

This matter came before the Court pursuant to a written request to correct the trial court record by Assistant County Attorney Beverly Wolfe. Attorney for Defendant, Assistant Public Defender Peter Gorman, has stated he does not oppose this request.

This request is based upon the accidental or inadvertent omission from the trial court record of two memorandums filed by Assistant County Attorney Gail Baez with this court during the pre-trial proceedings in this court.

Accordingly, IT IS HEREBY ORDERED:

1. That the attached memorandum titled "State's Memorandum in Opposition to Defendant's Motion to Dismiss," which was originally filed with this court on

February 1, 1990, be made part of the district court file in this case.

2. That the attached memorandum titled "State's Supplementary Memorandum Opposing Defendant's Motion to Dismiss," which was originally filed with this court on March 1, 1990, be made part of the district court file in this case.

BY THE COURT:
/s/ Robert H. Lynn
Robert H. Lynn
Judge of the District Court

DATED: October 16, 1992

[Attached memoranda are omitted because they appear in the preceding pages of this Joint Appendix.]

No. 91-2019

In the

Supreme Court of the United States

October Term, 1992

STATE OF MINNESOTA,

Petitioner,

vs.

TIMOTHY DICKERSON,

Respondent.

ON WRIT OF CERTIORARI TO THE
MINNESOTA SUPREME COURT

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Does the Fourth Amendment to the United States Constitution permit a "plain feel" exception to its warrant requirement clause for seizures of objects where a police officer develops, through the *sense of touch* during a lawful pat search, probable cause to believe that the suspect possesses contraband or other evidence of a crime?

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Constitutional Provisions:

Statutory Provisions:

Other Authorities:

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

No. 91-2019

STATE OF MINNESOTA,
Petitioner,

vs.

TIMOTHY DICKERSON,
Respondent.

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Minnesota Supreme Court, reproduced at Appendix A of the Petition for a Writ of Certiorari,[1] is reported at 481 N.W.2d 840 (Minn. 1992). The opinion of the Minnesota Court of Appeals, reproduced in Appendix B of the Petition, is reported at 469 N.W.2d 462 (Minn. Ct. App. 1992). The order of the Fourth Judicial District Court,[2] reproduced at Appendix C of the Petition, is unreported.

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1. Hereinafter referred to as Petition.

2. Hereinafter referred to as Trial Court Order.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Minnesota Supreme Court was entered on March 20, 1992. The Petition for a Writ of Certiorari was filed on June 17, 1992, within ninety days of the Minnesota Supreme Court's decision. This Court granted the Writ for Certiorari on October 5, 1992.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1992).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

On November 9, 1989, Officer Vernon Rose of the Minneapolis Police Department was on a routine patrol in the area of 10th and Morgan Avenue North in Minneapolis, Minnesota (T. 7-8).[3] Officer Rose was a 14-year veteran of the department, having served 11 and 1/2 of those years in that area of Minneapolis. In the prior two years, Officer Rose had participated in the execution of approximately 75 drug search warrants and made between 50 and 75 drug arrests (T. 4-6, 21-22). He had both responded to complaints about drug dealings and participated in the execution of search warrants at the apartment building located at 1030 Morgan Avenue North. The searches had resulted in seizures of drugs, guns and knives (T. 6-7, 14, 16, 21).

At approximately 8:15 p.m., Officer Rose saw Respondent, Timothy Dickerson, exit the front door of 1030 Morgan Avenue North and walk towards the street (T. 8). When Respondent saw the squad car, he turned abruptly and walked towards the alley (T. 8, 12-14). Officer Rose and his partner drove into the alley and stopped Respondent (T. 9).

The trial court, the Minnesota Court of Appeals and the Minnesota Supreme Court all found that Officer Rose had sufficient grounds under *Terry v. Ohio*, 392 U.S. 1 (1968), to stop Respondent and, incident to that stop, to conduct a protective pat search of Respondent's person. *See State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992)

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3. "T" refers to the transcript of the evidentiary hearing, the court trial and the sentencing hearing. The facts set forth in this brief mirror specific findings the trial court made. The trial court's findings are reprinted at Appendix C-1-2 in the Petition.

(Petition Appendix A-5); *State v. Dickerson,* 469 N.W.2d 462, 465 (Minn. Ct. App. 1991), *aff'd,* 481 N.W.2d 840 (Minn. 1992) (Petition Appendix B-6); Trial Court Order (Petition Appendix C-3-5).

While conducting a pat search of Respondent, Officer Rose felt a small, hard object wrapped in plastic in the pocket of Respondent's "very fine nylon" jacket (T. 9). Based upon his feel of the object, as well as his prior experience in feeling crack cocaine through clothing, Officer Rose concluded that the object was crack cocaine. Having probable cause to believe the object was contraband, Officer Rose seized the object from Respondent's pocket (T. 9-10). Later testing confirmed that the object was .20 grams of crack cocaine (T. 64).

On December 28, 1989, Respondent was charged with the offense of controlled substance crime in the fifth degree.[4] At a pretrial hearing, Respondent moved to suppress the seized crack cocaine arguing that the stop and pat search violated the Fourth and Fourteenth Amendments of the United States Constitution (T. 2-3). Both Officer Rose and Respondent testified concerning the events leading up to the seizure of the crack cocaine.

Officer Rose testified that when he searched Respondent "for weapons and contraband," he "felt a lump, a small lump, in the front pocket. [He] examined it with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane" (T. 9). Officer Rose also testified that because he had "felt [crack cocaine] in clothing" approximately 50 to 75 times on prior occasions, he "was absolutely sure that's what [was in Respondent's pocket], or

4. *See* Minn. Stat. § 152.025, subd. 2(1), subd. 3(a) (1989) (reprinted at Appendix A-1 of this Brief) (hereinafter referred to as Brief Appendix).

[he] would have left it there" (T. 5-6, 9-10). Respondent did not present any evidence to dispute Officer Rose's testimony concerning the touching and seizing of the crack cocaine (T. 28-33).

On March 6, 1992, the trial court found that the investigative stop and pat search were proper. *See* Trial Court Order (Petition Appendix C-3). The court also ruled that Officer Rose acted properly in seizing the crack cocaine. *See id.* In upholding the seizure, the court stated:

> [T]here is no distinction as to which sensory perception the officer uses to conclude that the material is contraband. An experienced officer may rely upon his sense of smell in DWI stops or in recognizing the smell of burning marijuana in an automobile. The sound of a shotgun being racked would clearly support certain reactions by an officer. The sense of touch, grounded in experience and training, is as reliable as perceptions drawn from other senses. "Plain feel," therefore, is no different than plain view and will equally support the seizure here.

Trial Court Order (Petition Appendix C-5).

Respondent requested that the case be submitted to the trial court on the basis of the testimony presented at the pretrial hearing and on certain stipulated facts (T. 61). On May 9, 1990, the court found Respondent guilty of controlled substance crime in the fifth degree (T. 65-66). The court deferred entry of the judgment of guilt[5] and

5. Under Minn. Stat. § 152.18, subd. 1 (1989) (Brief Appendix A-2-3), a trial court may, without entering a judgment of guilt, place a defendant found guilty under the controlled substance laws on

Footnote cont to next page

placed Respondent on probation for a period of two years (T. 68-69).[6]

Respondent appealed. On April 30, 1991, the Minnesota Court of Appeals affirmed the propriety of Officer Rose's stop and pat search of Respondent. *See Dickerson*, 469 N.W. 2d at 465 (Petition Appendix B-6-7). But the court of appeals declined "to adopt the plain feel exception in Minnesota" and found that the seizure of the crack cocaine was improper. *Dickerson*, 469 N.W.2d at 467 (Petition Appendix B-10).

The State petitioned to the Minnesota Supreme Court arguing that the court of appeals' ruling on the seizure was incorrect.[7] On March 20, 1992, the Minnesota Supreme Court unanimously held that the stop and pat search were proper. *See Dickerson*, 481 N.W.2d at 843 (Petition Appendix A-5). But, in a four-to-three decision, the supreme court held that Officer Rose's seizure of the crack cocaine, violated the Fourth Amendment of the United States Constitution.[8] The majority concluded that the seizure of crack cocaine "in this case required a warrant, which police did not have." *Id.* (Petition Appendix A-5).

Three members of the Minnesota Supreme Court dissented, finding that the majority's conclusion represented "a departure from common sense and common experience." *Id.* at 846 (Coyne, J., dissenting) (Appendix A-13). The dissenters reasoned:

> This simple act of feeling the outline and shape of the lump was permissible under *Terry*, and it appears from Rose's testimony that, because of his extensive experience in discovering crack cocaine while patting down previous suspects, he was "absolutely sure" that the substance was crack cocaine "before" he reached into the pocket and removed it.
>
> * * *

Footnote 5 cont from previous page

probation for a period of time. If the defendant successfully completes probation, the proceedings against the defendant are dismissed. *See id.* A non-public record of the proceedings is maintained and is made available to courts to determine the merits of any future proceedings against the defendant. *See id.* A deferred adjudication under this statute will also be included in a defendant's criminal history score if he is convicted of a federal offense. *See* U.S.S.G. §§ 4A1.1(c) and 4A1.2(f) (Brief Appendix B-1-4).

6. On May 6, 1992, Respondent successfully completed probation and the criminal proceedings were dismissed pursuant to Minn. Stat. § 152.18 (1989).

7. Contrary to a statement in the Minnesota Supreme Court's decision, *State v. Dickerson*, 481 N.W.2d 840, 842 (Minn. 1992) (Petition Appendix A-2), Respondent did not file a cross appeal and, thus, did not challenge the court of appeals' rulings on the stop and pat frisk.

8. The Minnesota Supreme Court based its opinion on the Fourth Amendment to the United States Constitution. The court's decision repeatedly refers to the Fourth Amendment as the basis for its decision. *See State v. Dickerson*, 481 N.W.2d 840, 843-44 (Minn. 1982) (Petition Appendix A-4-7). The search and seizure provision of the Minnesota State Constitution is contained in Article I, § 10 (Brief Appendix A-1). The Minnesota Supreme Court neither stated nor implied that Article I, § 10, served as any basis for its decision. In contrast, the Minnesota Supreme Court has clearly articulated those instances in which the state constitution serves as the basis for its decision. *Cf. State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991) (in invalidating statutory distinctions between crack cocaine and powder cocaine on the ground that it was racially discriminatory, the supreme court clearly enunciated that it was basing its decision on the state constitution rather than the federal constitution's Equal Protection Clause).

> [T]he officer did not violate [Respondent's] fourth amendment rights in discovering and seizing the crack cocaine.
>
> * * *
>
> *[A] policeman should not be compelled to ignore what his senses--whether sight, sound, smell, taste, or touch--tell him in clear and unmistakable language.*

Id. at 849, 851 (Coyne, J., dissenting) (emphasis added) (Petition Appendix A-18-19, A-23-24).

On June 17, 1992, the State of Minnesota filed its Petition for a Writ of Certiorari to the Minnesota Supreme Court with this Court. On October 5, 1992, this Court granted the Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

1. The primary issue is whether the Fourth Amendment permits police to rely upon the sense of touch when determining if, under the totality of the circumstances, they have probable cause to seize a non-weapon object during a *Terry* pat search.

a. This Court has held that probable cause is a flexible, common sense standard. *See Texas v. Brown*, 460 U.S. 730, 742 (1983). This Court's decisions reflect that, for Fourth Amendment purposes, there is no hierarchy among the senses with respect to reliability. Law enforcement officers are able to rely upon all of their senses when making probable cause determinations concerning the presence of contraband or other evidence of a crime. *See, e.g., Johnson v. United States*, 333 U.S. 10, 13-14 (1948). Officers are also permitted to rely upon their sense of touch to identify objects when their lives are subject to danger. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968).

Both scientific research and common sense indicates that, under certain circumstances, the sense of touch may prove as or more reliable than the sense of sight in identifying objects. Numerous courts adopting the "plain feel" corollary to the "plain view" doctrine have found that the sense of touch can, within the totality of the circumstances, establish probable cause that an object is contraband or other evidence of a crime. *See, e.g., United States v. Pace*, 709 F. Supp. 948, 955 (C.D. Cal. 1989), *aff'd*, 893 F.2d 1103 (9th Cir. 1990).

This Court's decision in *Terry* is the forerunner of the "plain feel" exception. *Terry* permits police to rely upon their sense of touch to determine if an object is a weapon. This case extends *Terry* to the next logical step -- that the

Fourth Amendment permits police engaged in a lawful touching to rely upon their sense of touch to determine if an object is contraband or other evidence of a crime.

b. Police are entitled to make a warrantless seizure of an object when they have lawful access to the object and have developed probable cause to believe that the object is contraband or other evidence of a crime. *See Brown*, 460 U.S. at 739. Such seizures are permissible even when the probable cause is developed during the course of a *Terry* stop. *See Michigan v. Long*, 463 U.S. 1032, 1050 (1983).

Requirement of a warrant in this case is both unnecessary and impractical. Because of the time necessary to obtain a warrant, police would have to either detain Respondent for a lengthy period of time or allow Respondent to walk away with the crack cocaine. The first alternative would constitute a greater intrusion than the seizure of the crack cocaine. The second alternative would unduly hamper effective law enforcement.

c. Once police obtain probable cause to believe that an object possessed by a suspect is contraband or other evidence of a crime, a suspect no longer retains any privacy interest in the object. The suspect's only remaining interest is possessory. Therefore, seizure of the object does not violate any Fourth Amendment protected right of privacy. *See Horton v. California*, 496 U.S. 128, 133-34 (1990).

Probable cause seizures based upon the sense of touch are no more intrusive than probable cause seizures based upon the sense of sight. Since the initial intrusion was caused by the permissible touching of the crack cocaine and this touching created probable cause, Officer Rose's seizure of the object did not invade any of Respondent's constitutionally protected privacy rights.

Permitting police to make probable cause seizures of non-weapon objects during protective pat searches will not encourage police to conduct pretextual stops or to go beyond the limits of a proper *Terry* search. There is no incentive for police to engage in improper stops and pat searches since, if the underlying stop and search is improper, any resulting evidence will not be admissible at trial. Excluding evidence obtained as a result of probable cause developed during a valid *Terry* stop only results in the suppression of probative evidence and does nothing to deter improper *Terry* stops and searches.

d. Officer Rose's seizure of the crack cocaine was permissible not only under the "plain feel" exception, but also under the search incident to arrest exception to the warrant clause. The same probable cause which justified seizure of the crack cocaine would have also justified the warrantless arrest of Respondent for possession of a controlled substance. Once Respondent was under arrest, the crack cocaine could properly be seized in a search incident to that arrest. *See Chimel v. California*, 395 U.S. 752, 755-56 (1969).

The fact that a seizure takes place immediately before, rather than immediately after, the arrest is of no constitutional significance. *See Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980). Whether the seizure was done as a search incident to arrest or as a probable cause seizure under the "plain feel" exception, Officer Rose developed probable cause by touching Respondent's pocket. Under the totality of the circumstances, this touch justified the warrantless seizure of the crack cocaine.

2. Warrantless seizures are permitted under the "plain feel" corollary to the plain view doctrine if two

criteria are met. First, the officer must have lawfully touched the item. Second, the officer's sense of touch, within the totality of the circumstances, must provide the officer with probable cause to believe that the object he felt was contraband or other evidence of a crime.

Both criteria have been satisfied in this case. First, as all three courts found below, Officer Rose made a valid *Terry* stop and lawfully touched Respondent's pocket during a protective pat search. Second, this feel of the pocket, under the totality of the circumstances, established probable cause that the lump in Respondent's pocket was cocaine. The other circumstances include Officer Rose's extensive prior experience with feeling crack cocaine through clothing, his knowledge that Respondent had just left a known crack house and his observation that Respondent took evasive actions when he saw the police car.

The trial court had an opportunity to view Officer Rose's demeanor and found his testimony concerning his identification of the lump as crack cocaine to be credible. Respondent did not offer any testimony to contradict Officer Rose's testimony nor did Respondent request that the trial court feel the crack cocaine. Independent review of the record supports the trial court's credibility finding.

ARGUMENT

I.

POLICE MAY SEIZE CONTRABAND WITHOUT A WARRANT WHEN THEY DEVELOP, THROUGH THE SENSE OF TOUCH DURING A LAWFUL *TERRY* PAT SEARCH, PROBABLE CAUSE TO BELIEVE THAT A SUSPECT POSSESSES CONTRABAND OR OTHER EVIDENCE OF A CRIME.

The Fourth Amendment to the United States Constitution permits police to rely upon all of their senses, including the sense of touch, when making probable cause determinations. Probable cause is based upon the totality of the circumstances and can be supported by one or more of a police officer's senses. To require police to ignore contraband discovered during the course of a legitimate *Terry* frisk *solely* because the probable cause is based, in part, upon the officer's sense of touch defies common sense and unnecessarily hampers effective law enforcement.

A. Probable Cause for a Search and Seizure Can Be Based on All of an Officer's Senses.

> [P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief," . . . that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical,

> nontechnical" probability that incriminating evidence is involved is all that is required.

Texas v. Brown, 460 U.S. 730, 742 (1983) (citations omitted). For an officer to have probable cause to believe contraband is present, the contraband "must only be 'obvious to the senses . . . .' To be obvious to the senses, contraband need only reveal itself in a characteristic way to one of the senses." *United States v. Norman*, 701 F.2d 295, 297 (4th Cir.), *cert. denied*, 464 U.S. 820 (1983) (citation omitted) (quoting *United States v. Sifuentes*, 504 F.2d 845, 848 (4th Cir. 1974)).

This Court has repeatedly indicated that probable cause can be determined through senses other than sight.[9] In *Johnson v. United States*, 333 U.S. 10 (1948), this Court effectively recognized a "plain smell" corollary to the "plain view" exception. The defendant in *Johnson* argued that a narcotics officer's detection of the odor of burning opium from an adjacent room was an insufficient basis to justify the issuance of a search warrant. In rejecting this argument, this Court stated that detection of the presence of distinctive odors by one "qualified to know the odor" established probable cause for the search. *Id.* at 13; *see also United States v. Johns*, 469 U.S. 478, 482 (1985) (scent of marijuana from trucks established probable cause to believe trucks contained contraband).

Similarly in *Brown*, this Court affirmed the seizure of a balloon where the officer's experience and the balloon's outward appearance established probable cause to believe that the balloon contained narcotics even though the officer

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9. *See generally* Larry E. Holtz, *The "Plain Touch" Corollary: A Natural and Foreseeable Consequence of the Plain View Doctrine*, 95 Dick. L. Rev. 521, 533-37 (1991).

"could not see through the opaque fabric of the balloon." *Brown*, 460 U.S. at 743. *See generally Arkansas v. Sanders*, 442 U.S. 753, 764-65 n.13 (1979), *overruled on other grounds by California v. Acevedo*, ___ U.S. ___, 111 S. Ct. 1982 (1991) (despite the fact that certain objects cannot be seen, these objects are subject to a probable cause seizure if "their contents can be inferred from their outward appearance").

This Court has also recognized that police may rely upon their sense of touch when detecting weapons on a potentially armed suspect. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968).

Implicit in this Court's decisions is the principle that there is no preferential ranking of the senses in developing probable cause. The senses of touch, smell and hearing are not inherently less reliable than the sense of sight. When identifying certain objects, the sense of touch may be more accurate than the other senses.[10]

---

10. Several studies have shown that haptic identification (perceptual system using the hands as well as other parts of the body) is remarkably fast and accurate in recognizing distinctive qualities such as texture, hardness, thermal conductivity and absolute size. *See* Roberta L. Klatzky, et al., *Haptic Integration of Object Properties: Texture, Hardness, and Planer Contour*, 15 Journal of Experimental Psychology: Human Perception and Performance 45, 56 (1989); Roberta L. Klatzky, et al., *Identifying Objects by Touch: An "Expert System,"* 37 Perception & Psychophysics 299, 300-01 (1985) (hereinafter referred to as Klatzky, *Identifying Objects*); Roberta L. Klatzky, et al., *There's More to Touch Than Meets the Eye: The Salience of Object Attributes for Haptics With and Without Vision*, 116 Journal of Experimental Psychology: General 356, 357 (1987). For example, an individual may more precisely and more quickly identify a fabric such as suede by touching it than by merely viewing it at length. With experience, it was found that people needed less time and sensory input to identify familiar objects and that "past experience with objects --

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Thus, under certain circumstances, an officer's other senses may prove to be more reliable than his sense of sight. For example, the sense of sight often cannot distinguish between a hand rolled tobacco cigarette and a hand rolled marijuana cigarette. Once the two cigarettes are lit, an experienced police officer could easily distinguish between the two cigarettes using his sense of smell.

The sense of hearing is also more helpful than the sense of sight if a gun is fired behind a closed door. An officer would not be able to see the gun fire, but undoubtedly he would be able to hear it as well as ascertain whether the weapon fired was a rifle, shotgun or handgun.

A more pertinent example is provided by powder cocaine. A trained police officer would not be able to distinguish between powder cocaine and baking powder through the sense of sight. But an experienced narcotics officer could distinguish between the two powders through the sense of touch.

Indeed, no court could issue a ranking of the senses for purposes of probable cause determinations. Police must serve under a variety of circumstances and in an infinite number of situations. Reliability of all senses will vary, but no sense is so inherently unreliable that police should be barred from using it when making a probable cause determination.

Scientific research[11] as well as common sense confirms the reliability of the sense of touch. Not

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visual as well as tactile -- might enable [identification] on the basis of minimal cues." Klatzky, *Identifying Objects*, at 301.

11. In a study, 100 objects no larger than a hand were placed before twenty individuals. On the average, the twenty participants were able to identify 94 of the 100 objects within five seconds using

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surprisingly, courts have rejected the contention "that the tactile sense is inherently less reliable than the sense of sight." *United States v. Pace*, 709 F. Supp. 948, 955 (C.D. Cal. 1989), *aff'd*, 893 F.2d 1103 (9th Cir. 1990). In adopting the "plain feel" exception, the *Pace* court concluded that:

> When objects have a distinctive and consistent feel and shape that an officer has been trained to detect and has previous experience in detecting, then touching these objects provides the officer with the same recognition his sight would have produced.

Id. A total of five federal circuit courts of appeals,[12] two federal district courts[13] and appellate courts in ten states[14] have adopted the "plain feel" exception.

Footnote 11 cont from previous page

their sense of touch. *See* Roberta L. Klatzky, et. al., *Identifying Objects by Touch: An "Expert System,"* 37 Perception & Psychophysics 299, 301 (1985).

12. *See United States v. Buchannon*, 878 F.2d 1065, 1067 (8th Cir. 1989); *United States v. Williams*, 822 F.2d 1174, 1184 (D.C. Cir. 1987); *United States v. Norman*, 701 F.2d 295, 297 (4th Cir.), *cert. denied*, 464 U.S. 820 (1983); *United States v. Ocampo*, 650 F.2d 421, 429 (2d Cir. 1981); *United States v. Portillo*, 633 F.2d 1313, 1320 (9th Cir. 1980), *cert. denied*, 450 U.S. 1043 (1981).

13. *See United States v. Ceballos*, 719 F. Supp. 119, 128 (E.D.N.Y. 1989); *United States v. Pace*, 709 F. Supp. 948, 954 (C.D. Cal. 1989), *aff'd*, 893 F.2d 1103 (9th Cir. 1990). Research has disclosed one case where a federal district court ruled that police were not allowed to seize an item from a suspect's pocket even though the officer believed that the lump in the pocket contained cocaine. *See United States v. Rodriquez*, 750 F. Supp. 1272, 1275 (W.D.N.C. 1990). This case, however, is distinguishable from the

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This Court's decision allowing weapon seizures based upon the sense of touch in *Terry* "is perhaps the most logical forerunner of the plain touch corollary" for probable cause seizures. Larry E. Holtz, *The "Plain Touch" Corollary: A Natural and Foreseeable Consequence of the Plain View Doctrine*, 95 Dick. L. Rev. 521, 534 (1991) (hereinafter referred to as Holtz, *"Plain Touch"*). In *Terry*, while conducting a protective pat search, Officer McFadden felt an object he believed was a weapon while patting down the outside pocket of Terry's overcoat. *See Terry*, 392 U.S. at 7. His determination that what he felt was a weapon was based upon his training and experience as a police officer. *See id.* at 5. Consequently, Officer

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"plain feel" cases because the officer "saw" the lump in the suspect's pocket and did not "feel" it during a pat search. The court apparently concluded that observation of "a small, inconspicuous bulge" was not a sufficient basis to believe that the lump was cocaine. *Id.* at 1275 n.1.

14. *See Jackson v. State*, 804 S.W.2d 735, 740 (Ark. Ct. App. 1991); *People v. Chavers*, 658 P.2d 96, 102 (Cal. 1983); *People v. Hughes*, 767 P.2d 1201, 1205-06 (Colo. 1989); *Doctor v. State*, 596 So. 2d 442, 445 (Fla. 1992); *State v. Lee*, 520 So. 2d 1229, 1233 (La. Ct. App. 1988); *State v. Vanacker*, 759 S.W.2d 391, 393-94 (Mo. Ct. App. 1988); *State v. Vasquez*, 815 P.2d 659, 664 (N.M. Ct. App.), *cert. denied*, 815 P.2d 1178 (N.M. 1991); *State v. Alamont*, 577 A.2d 665, 668-69 (R.I. 1990) (affirmed as seizure incident to arrest); *Ruffin v. Commonwealth*, 409 S.E.2d 177, 179-80 (Va. Ct. App. 1991); *State v. Richardson*, 456 N.W.2d 830, 836-39 (Wis. 1990).

Appellate courts in two states have considered the "plain feel" doctrine, but found it unnecessary under the facts in their cases to decide whether the doctrine should be adopted. *See State v. Ortiz*, 683 P.2d 822, 829 (Haw. 1984), *aff'g on other grounds*, 662 P.2d 517 (Haw. Ct. App. 1983); *State v. Zearley*, 444 N.W.2d 353,

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McFadden's "feel" or touching of the item, coupled with his years of experience as a police officer, provided him with reasonable grounds to conclude that the object was a weapon and subject to seizure. *Id.* at 30.

Under *Terry*, police may properly rely upon their sense of touch to conclude that an object may be a weapon. The logical extension of *Terry* -- permitting police to conclude that other objects felt during a proper pat search are contraband or other evidence of a crime -- is present in this case.

Like Officer McFadden in *Terry*, Officer Rose was conducting a lawful pat search when he felt an object in the outside pocket of Respondent's very fine nylon jacket (T. 9). Also, like Officer McFadden, Officer Rose testified that he was able to identify the seized object because of its

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358-59 (N.D. 1989), *aff'd appeal after remand*, 468 N.W.2d 391 (N.D. 1991). Appellate courts in two states are divided on whether the "plain feel" doctrine should be adopted. *Compare Anderson v. State*, 553 A.2d 1296, 1300 (Md. Ct. Spec. App. 1989) *with Alfred v. State*, 487 A.2d 1228, 1239-40 (Md. Ct. Spec. App. 1985); *compare In the Matter of Marrhonda G.*, 575 N.Y.S.2d 425, 429-31 (N.Y. Fam. Ct. 1991), *aff'd*, 585 N.Y.S.2d 345 (N.Y. App. Div. 1992) *with In the Matter of James L.*, 519 N.Y.S.2d 675, 676 (N.Y. App. Div. 1987).

In addition to Minnesota, appellate courts in five states have rejected the "plain view" doctrine. *See McDaniel v. State*, 555 So. 2d 1145, 1147 (Ala. Crim. App. 1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 43 (1990); *State v. Collins*, 679 P.2d 80, 81-82 (Ariz. Ct. App. 1983); *State v. Rhodes*, 788 P.2d 1380, 1381 (Okla. Crim. App. 1990); *Commonwealth v. Marconi*, 597 A.2d 616, 623 (Pa. Super. Ct. 1991), *appeal denied*, 611 A.2d 711 (Pa. 1992) (item not sufficiently distinguishable); *State v. Broadnax*, 654 P.2d 96, 102-03 (Wash. 1982).

distinctive shape and consistency (T. 9-10). The difference between this case and *Terry* is that the item seized in this case was a controlled substance rather than a weapon.[15]

The Fourth Amendment does not favor one sense over other senses for probable cause determinations. A police officer is not required to actually view an object before he can conclude he has probable cause to believe that an object is subject to seizure. Instead, probable cause can be based upon any of the officer's senses when the information learned from this sense, combined with the officer's experience and knowledge within the totality of the circumstances, leads him to reasonably believe that an object constitutes contraband or evidence of a crime.

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15. Seizure of a non-weapon object during a *Terry* search is also supported by Professor LaFave:

> Assuming the object discovered in the pat-down does not feel like a weapon, this only means that a further search may not be justified under a *Terry* analysis. *There remains the possibility that the feel of the object, together with other suspicious circumstances, will amount to probable cause that the object is contraband or some other item subject to seizure, in which case there may be a further search based upon that probable cause.*

Wayne LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.4(c) at 524 (2d ed. 1987) (footnote omitted) (emphasis added).

B. A Police Officer May Make a Warrantless Seizure of an Object if He Develops Probable Cause During a Stop to Believe that a Suspect Possesses Contraband or Other Evidence of a Crime.

1. A warrant is not required for a seizure when police obtain probable cause to seize an object during a lawful *Terry* stop.

A police officer is entitled to make a warrantless seizure of an object when, during a lawful stop of a person or car, the officer develops probable cause to believe that an object is contraband or other evidence of a crime. *See Brown*, 460 U.S. at 739; *see also Payton v. New York*, 445 U.S. 573, 587 (1980) ("objects such as weapons or contraband found in a public place may be seized by the police without a warrant"); *United States v. Place*, 462 U.S. 696, 701-02 (1983) (seizures are proper when an item is in plain view under certain circumstances and "the risk of the item's disappearance or use for its intended purpose before a warrant may be obtained outweighs the interest in possession").

The warrantless seizure of non-weapon items is proper even if the police officer's perception occurs during a *Terry* search for weapons. In holding that contraband may be seized during a *Terry* search of a car, this Court stated:

> If, while conducting a legitimate *Terry* search . . . the officer should, as here, discover contraband other than weapons, *he clearly cannot be required to ignore the contraband*, and

> the Fourth Amendment does not require its suppression in such circumstances.

Michigan v. Long, 463 U.S. 1032, 1050 (1983) (citations omitted) (emphasis added).

Not only is a warrant unnecessary under these circumstances, it is also impractical. If police were to detain Respondent while they obtained a warrant, the lengthy detainment would be a far greater intrusion than was the immediate seizure of the crack cocaine. On the other hand, if Respondent were allowed to walk away, either he or the cocaine would likely disappear before police could obtain a warrant.

When probable cause is established in a stop situation, the additional step of obtaining a warrant does nothing to further the Fourth Amendment's central purpose of ensuring that searches and seizures are reasonable. Exigent circumstances justifies a warrantless seizure in stop situations. As this Court has stated:

> [R]equiring police to obtain a warrant once they have obtained a first-hand perception of contraband, stolen property, or incriminating evidence generally would be a 'needless inconvenience' . . . that might involve danger to the police and public.

Brown, 460 U.S. at 739 (citations omitted).

This Court's decisions establish that once an officer has probable cause to seize an object during a *Terry* stop, he is not required to stop and go obtain a warrant. Nonetheless, the Minnesota Supreme Court erroneously concluded that Officer Rose needed a warrant before he could seize the crack cocaine from Respondent's pocket.

The court imposed a warrant requirement because the probable cause was based, in part, upon Officer Rose's touch of the pocket. *See State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (Petition Appendix A-5). But, for purposes of the Fourth Amendment, probable cause based upon the sense of touch is equally as credible as probable cause based upon other senses.[16] Consequently, the propriety of a seizure during a stop depends upon whether there is probable cause, not how the probable cause is developed.

In determining whether a warrant is required, courts must strike a realistic balance between a suspect's possessory interest and the need for effective law enforcement. *See Brown* 460 U.S. at 739. The Minnesota Supreme Court's decision did not provide a realistic balance. Its imposition of a warrant requirement for this seizure "represents a departure from common sense and common experience." *Dickerson*, 481 N.W.2d at 846 (Coyne, J., dissenting) (Petition Appendix A-13).

2. A probable cause seizure based upon the sense of touch is no more intrusive than a probable cause seizure based upon the sense of sight.

This Court has repeatedly stated that once police obtain probable cause to believe that an object is contraband or other evidence of a crime, the suspect no longer has a privacy interest to protect. *See Horton v. California*, 496 U.S. 128, 133-34 (1990); *Illinois v. Andreas*, 463 U.S. 765, 771 (1983); *Brown*, 460 U.S. at 741-42.

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16. *See* Appendix I.A. of this Brief.

From his perceptions obtained before and during a legitimate *Terry* stop and pat search, Officer Rose developed probable cause to believe Respondent possessed crack cocaine. Officer Rose's intrusion into Respondent's privacy went no further than *Terry* and its progeny allow. Once this probable cause was developed, Respondent's interest in the crack cocaine became possessory only. *See United States v. Williams*, 822 F.2d 1174, 1182 (D.C. Cir. 1987) ("no reasonable expectation of privacy attaches to containers whose contents are readily discernible through the use of some sense other than sight"). In light of the dangers that crack cocaine poses to the public, Officer Rose was fully justified in interfering with Respondent's bare possessory interest. *See Brown*, 460 U.S. at 739.

Although the Minnesota Supreme Court unanimously agreed that the stop and pat search of Respondent was permissible under *Terry*, the majority of the court refused to permit the warrantless seizure of the crack cocaine on the ground that probable cause developed through the sense of touch "is far more intrusive into the personal privacy." *Dickerson*, 481 N.W.2d at 845 (Petition Appendix A-8). But, because the touching of Respondent's pocket was permissible and this touching resulted in probable cause for the seizure, Respondent no longer retained a privacy interest in the crack cocaine. Consequently, seizure of the crack cocaine was no more intrusive in this situation than it would have been had Officer Rose visibly seen the crack cocaine in Respondent's pocket before he seized it.

Implicit in the Minnesota Supreme Court's decision is the concern that allowing seizure of items where the probable cause is based, in part, upon the sense of touch, will encourage police to conduct pretext stops and to exceed the permissible scope of a *Terry* weapons search. Yet, the appropriate manner for addressing this concern is through

strict enforcement of the *Terry* limits. *Cf. Horton*, 496 U.S. at 139-40 (enforcing limitations on search activities would be more effective in preventing improper searches than retaining an inadvertence requirement). If the initial stop has an insufficient basis or if the pat search exceeds the scope of a legitimate search for weapons, then any objects seized as a result of those improper actions would be inadmissible at trial.

Such exclusion is sufficient to deter illegitimate police activity. Imposing a warrant requirement on all seizures where the probable cause is developed, in part, through the sense of touch would do little to deter illegitimate intrusions into the privacy of citizens and would needlessly endanger public safety.

3. Once police have probable cause to believe that a suspect possesses contraband, they may also seize the contraband under the alternate rationale that the seizure was part of a search incident to arrest.

Officer Rose's seizure of the crack cocaine was also permissible under the search incident to arrest exception to the warrant requirement. Pursuant to this exception, police are allowed to seize items from a person who has been lawfully placed under arrest. *See Chimel v. California*, 395 U.S. 752, 755-56 (1969).

The fact that the arrest did not occur until after Officer Rose seized the crack cocaine did not invalidate the seizure. As this Court noted:

> Where the formal arrest followed quickly on the heels of the challenged search of petitioner's

> person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.

Rawlings v. Kentucky, 448 U.S. 98, 111 (1980) (citations omitted).

Several courts that have affirmed seizures under the "plain touch" exception, have also affirmed the same seizures under the alternate rationale that the seizure was part of a search incident to arrest. *See United States v. Ceballos*, 719 F. Supp. 119, 128 (E.D.N.Y. 1989); *Pace*, 709 F. Supp. at 956-57; *Jackson v. State*, 804 S.W.2d 735, 740 (Ark. Ct. App. 1991); *People v. Thurman*, 257 Cal. Rptr. 517, 522 (Cal. Ct. App. 1989); *State v. Bearden*, 449 So. 2d 1109, 1116 (La. Ct. App.), *writ denied*, 452 So. 2d 179 (La. 1984).[17]

Because Officer Rose's touching of the lump gave him sufficient probable cause to believe that Respondent had committed the offense of possession of a controlled substance,[18] he was entitled to make a warrantless arrest of Respondent. *See United States v. Watson*, 423 U.S. 411, 421 (1976). Consequently, it was not unreasonable for Officer Rose to conduct the seizure of the crack cocaine before a formal arrest. The fact that Officer Rose seized the crack cocaine immediately before, rather than

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17. Two courts have affirmed seizures *solely* on the ground that it was properly seized incident to arrest when the probable cause for the arrest was based, in part, upon the officer's feel of the contraband during a protective pat search and the arrest occurred after the seizure. *See State v. Cornell*, __N.W.2d__, No. C7-92-941, slip op. at 11 (Minn. Ct. App. Oct. 27, 1992); *State v. Alamont*, 577 A.2d 665, 668-69 (R.I. 1990).

18. This probable cause is outlined in Argument II of this Brief.

immediately after, the arrest is of no constitutional significance. Under either scenario, the probable cause obtained from Officer Rose's touching of the crack cocaine justified the seizure of the crack cocaine.

II.

OFFICER ROSE'S SEIZURE OF THE CRACK COCAINE WAS PERMISSIBLE UNDER THE "PLAIN FEEL" COROLLARY TO THE PLAIN VIEW DOCTRINE.

Two criteria must be satisfied before a seizure is justified pursuant to the "plain feel" corollary to the plain view doctrine.[19] First, the officer must have have lawfully felt the item. Second, the sense of touch, when combined with other circumstances, must provide the officer with probable cause[20] to believe that the container holds contraband or other evidence of a crime. *See, e.g, United States v. Salazar*, 945 F.2d 47, 51 (2d Cir. 1991), *cert. denied*, ___U.S.___, 112 S. Ct. 1975 (1992); *Ceballos*, 719 F. Supp. at 127-28; *Doctor v. State*, 596 So. 2d 442, 445 (Fla. 1992); *see also* Holtz, *"Plain Touch,"* at 530-31.

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19. These two criteria for the "plain feel" exception mirror the two requirements for seizures under the "plain view" doctrine. *See Horton v. California*, 496 U.S. 128, 136-37 (1990).

20. Most of the courts adopting the "plain feel" exception have indicated that the officer only needs probable cause to make the seizure. But some courts have required the higher standard of "reasonable certainty." *United States v. Williams*, 822 F.2d 1174, 1184 (D.C. Cir. 1987). *See also State v. Vasquez*, 815 P.2d 659, 664 (N.M. Ct. App.), *cert. denied*, 815 P.2d 1178 (N.M. 1991); *In the Matter of Marrhonda G.*, 575 N.Y.S.2d 425, 431 (N.Y. Fam. Ct. 1991), *aff'd*, 585 N.Y.S.2d 345 (N.Y. App. Div. 1992). This Court, however, has stated that probable cause is all that is necessary to justify a search or seizure. *See Texas v. Brown*, 460 U.S. 730, 741-42 (1983); *see also United States v. Pace*, 709 F. Supp. 948, 955 n.3 (C.D. Cal. 1989), *aff'd*, 893 F.2d 1103 (9th Cir. 1990).

The first criteria requires that police both lawfully be in the place where the touch occurred and lawfully touch the object. The officer may be making an investigative stop, a routine traffic stop or an intrusion pursuant to a warrant or consent. Once the officer has lawful access to that location, he must also have a lawful right to touch or feel the object. This touch often occurs during a weapons pat search of a suspect. *See, e.g., Jackson*, 804 S.W.2d at 737 (pat search following *Terry* stop); *People v. Hughes*, 767 P.2d 1201, 1203 (Colo. 1989) (pat search of person during police execution of premises warrant); *State v. Vanacker*, 759 S.W.2d 391, 392 (Mo. Ct. App. 1988) (pat search following traffic roadblock stop).

The second criteria requires that the officer's sense of touch, combined with other circumstances, must provide the officer with probable cause to believe that the object is contraband or other evidence of a crime. These other circumstances can include the officer's experience and training, the circumstances surrounding the search and the officer's prior knowledge of the suspect's activities. *See, e.g., Ceballos*, 719 F. Supp. at 125 (suspect's evasive behavior along with officer's sense of touch contributed to probable cause); *People v. Lee*, 240 Cal. Rptr. 32, 33-34, 36 (Cal. Ct. App. 1987) (suspect's presence in area known "for 'high narcotic activity'" and officer's sense of touch contributed to probable cause); *Doctor*, 596 So. 2d at 445 (officer's touch of the contraband and his experience of feeling crack cocaine on 800 prior occasions contributed to probable cause).

Both criteria for the "plain feel" doctrine have been satisfied in the instant case. First, all three courts below ruled that Officer Rose lawfully touched Respondent's pocket. These courts found that Officer Rose had both specific and articulable facts to suspect that Respondent may

be involved in criminal activity and a reasonable basis to fear for his safety during the investigative stop.[21] *See Dickerson*, 481 N.W.2d at 843 (Petition Appendix A-5); *State v. Dickerson*, 469 N.W.2d 462, 465 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn. 1992) (Petition Appendix B-6); Trial Court Order (Petition Appendix C-3).

Second, Officer Rose's feel of the pocket, along with other factors, was sufficient to establish probable cause to believe that there was crack cocaine in Respondent's pocket.[22] Officer Rose testified that when he touched the fine nylon jacket pocket, he felt a small lump wrapped in cellophane (T. 9). When he examined the lump with his fingers, it slid (T. 9). From this feel, and his experience in feeling crack cocaine in pockets on 50 to 75 other occasions, he was "absolutely sure" that the lump was crack cocaine (T. 5-6, 9-10). The officer's knowledge that the lump matched the distinctive shape of crack cocaine and his recognition that the lump was in packaging commonly used for crack cocaine, coupled with his knowledge that

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21. Although Officer Rose testified that he pat searched Respondent for "weapons and contraband" (T. 9), his candor that he expected to find contraband on Respondent did not affect the constitutionality of the pat search. As long as there is an objectively determined constitutional basis for the pat-down, the fact that an officer may also have another motive does not invalidate the seizure of contraband or other evidence of a crime found during a search. *See Horton v. California*, 496 U.S. 128, 137-42 (1990). Therefore, the pat search of Respondent was valid since, as all three courts below found, there was a constitutional basis justifying the search.

22. If the higher standard of "reasonable certainty" set forth in *United States v. Williams*, 822 F.2d 1174 (D.C.Cir. 1987), were imposed in this case, Officer Rose's uncontroverted testimony that he was "absolutely sure" that the lump was crack cocaine (T. 10) satisfies this standard.

Respondent had just left a notorious crack house and took evasive action when he saw the police patrol car established probable cause to believe that the lump was crack cocaine.

In numerous cases where the facts surrounding the seizure of contraband are virtually identical to the facts in this case, courts have affirmed "plain feel" seizures. These courts found that the officer's sense of touch, under the totality of the circumstances, established probable cause for the seizure.[23]

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23. *See, e.g., United States v. Salazar*, 945 F.2d 47, 48 (2d Cir. 1991), *cert. denied*, ___U.S.___, 112 S. Ct. 1975 (1992) (officer "squeezed the outside of the pocket and . . . felt the crackling of plastic"); *United States v. Ceballos*, 719 F. Supp. 119, 122 (E.D.N.Y. 1989) (officer "felt a large bulge" inside the suspect's jacket); *United States v. Pace*, 709 F. Supp. 948, 951 (C.D. Cal. 1989), *aff'd*, 893 F.2d 1103 (9th Cir. 1990) (officer felt two hard objects on the defendant's back that he identified through the "clothing as having the size and shape of two kilos of cocaine packaged in the form of 'bricks'"); *People v. Thurman*, 257 Cal. Rptr. 517, 521-22 (Cal. Ct. App. 1989) (believing that object was a gun, officer stuck his hand inside jacket pocket, squeezed the object and realized it was "rock cocaine" in a baggie); *People v. Lee*, 240 Cal. Rptr. 32, 34, 37 (Cal. Ct. App. 1987) (officer patted the chest area of defendant and "felt a clump of small resilient objects" that he believed were heroin-filled balloons); *People v. Hughes*, 767 P.2d 1201, 1203 (Colo. 1989) (officer felt a "hard cylindrical object" and pulled out a film canister containing cocaine); *Doctor v. State*, 596 So. 2d 442, 445 (Fla. 1992) (officer who had felt crack cocaine over 800 times, felt plastic bag with "peanut brittle type feeling in it" which he "equated to the texture of rock cocaine"); *State v. Bearden*, 449 So. 2d 1109, 1116 (La. Ct. App.), *writ denied*, 452 So. 2d 179 (La. 1984) (officers "felt an object [in the suspect's sock], which was obviously not a weapon, but which could be *tactilely* identified as a large quantity of pills" in a bag); *see also State v. Alamont*, 577 A.2d 665, 668 (R.I. 1990) (affirmed seizure pursuant to a probable cause arrest where the officer could detect a vial of crack based upon "its distinctive size and shape").

The trial court, which had an opportunity to observe Officer Rose's demeanor when he testified, found Officer Rose's testimony concerning his probable cause belief to be credible. *See* Trial Court Order (Petition Appendix C-2-3). Respondent offered no evidence to dispute Officer Rose's testimony (T. 28-33). Respondent also never requested that the trial court, itself, feel the crack cocaine through a nylon jacket. "[T]actile information can be preserved for trial to assure courts of an opportunity to evaluate the objects the officer claims to have triggered his sense of touch." *Pace*, 709 F. Supp. at 956. Accordingly, Respondent's failure to request that the trial court feel the crack cocaine weighs against any claim he may have that the officer's testimony was not credible.

Although the majority of the Minnesota Supreme Court questioned the credibility of Officer Rose's conclusion, this Court is not bound by the majority's skepticism. While this Court will not sit as a trial court "to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record." *Ker v. California*, 374 U.S. 23, 34 (1963). Independent review of the record in this case supports the trial court's finding that the totality of the circumstances established probable cause for the seizure. As the dissenting opinion noted, there is "no basis for rejecting the trial court's determination of credibility." *Dickerson*, 481 N.W.2d at 849 (Coyne, J., dissenting) (Petition Appendix A-19).

Officer Rose conducted a lawful stop and pat search of Respondent. His sense of touch during this search, combined with the totality of the other circumstances in this case, established probable cause to believe that Respondent possessed crack cocaine. Therefore, the probable cause

seizure of the crack cocaine was proper under the "plain feel" corollary to the plain view exception to the warrant requirement.

CONCLUSION

For the foregoing reasons, the State of Minnesota respectfully submits that the judgment of the Minnesota Supreme Court should be reversed.

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APPENDIX

APPENDIX A

Minnesota Constitutional and Statutory Provisions

Minn. Const., art. 1, §10:

> **Unreasonable searches and seizures prohibited.** The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be searched and the person or things to be seized.

Minnesota Statute § 152.025, subd. 2(1), subd. 3(a) (1989):

> Subd. 2. **Possession and other crimes.** A person is guilty of controlled substance crime in the fifth degree if:
> (1) the person unlawfully possesses one or more mixtures containing a controlled substance classified in schedule I, II, III, or IV, except a small amount of marijuana . . . .
>
> * * *

Subd. 3. **Penalty**. (a) A person convicted under subdivision 1 or 2 may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

Minnesota Statute § 152.18, subd. 1 (1989):

If any person is found guilty of a violation of section 152.024, 152.025 or 152.027 for possession of a controlled substance, after trial or upon a plea of guilty, the court may, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place the person on probation upon such reasonable conditions as it may require and for a period, not to exceed the maximum term of imprisonment provided for such violation. The court may give the person the opportunity to attend and participate in an appropriate program of education regarding the nature and effects of alcohol and drug abuse as a stipulation of probation. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge the person from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against that

person. Discharge and dismissal hereunder shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained by the department of public safety solely for the purpose of use by the courts in determining the merits of subsequent proceedings against such person. The court shall forward a record of any discharge and dismissal hereunder to the department of public safety who shall make and maintain the nonpublic record thereof as hereinbefore provided. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime or for any other purpose.

Minnesota Statute § 152.18, subd. 2 (1989):

Upon the dismissal of such person and discharge of the proceedings against the person pursuant to subdivision 1, such person may apply to the district court in which the trial was had for an order to expunge from all official records, other than the nonpublic record retained by the department of public safety pursuant to subdivision 1, all recordation relating to arrest, indictment or information, trial and dismissal and discharge pursuant to subdivision 1. If the court determines, after hearing, that such person was discharged and the proceedings dismissed, it shall enter such order. The effect of the order shall be to restore the person, in the contemplation of the law, to the status the person occupied before such arrest or indictment or

information. No person as to whom such an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of the person's failure to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made for the person for any purpose.

APPENDIX B

United States Sentencing Guidelines Provisions

U.S.S.G. §4A1.1:

Criminal History Category

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Page A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a

sentence. If 2 points are added for item (d), add only 1 point for this item.

(f) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was considered related to another sentence resulting from a conviction of a crime of violence, up to a total of 3 points for this item. *Provided*, that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion.

U.S.S.G. §4A1.a(c), Commentary 3:

§4A1.1(c). One point is added for each prior sentence not counted under §4A1.1(a) or (b). A maximum of four points may be counted under this item. The term "prior sentence" is defined at §4A1.2(a).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. See §4A1.2(e).

An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if imposed within five years of the defendant's

commencement of the current offense. See §4A1.2(d).

Sentences for certain specified non-felony offenses are counted only if they meet certain requirements. See §4A1.2(c)(1).

Sentences for certain specified non-felony offenses are never counted. See §4A1.2(c)(2).

A diversionary disposition is counted only where there is a finding or admission of guilt in a judicial proceeding. See §4A1.2(f).

A sentence for a foreign conviction, a tribal court conviction, an expunged conviction, or an invalid conviction, is not counted. See §4A1.2(h),(i),(j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court martial. See §4A1.2(g).

U.S.S.G. §4A1.2(f):

Diversionary Dispositions

Diversion from the judicial process without a finding of guilty (*e.g.*, deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of *nolo contendere*, in a judicial proceeding is counted as a sentence under

§4A1.1(c) even if a conviction is not formally entered, except that diversion from juvenile court is not counted.

U.S.S.G. §4A1.2(f), Commentary 9:

Diversionary Dispositions: Section 4A1.2(f) requires counting prior adult diversionary dispositions if they involved a judicial determination of guilt or an admission of guilt in open court. This reflects a policy that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency.

No. 91-2019

In the Supreme Court of the United States

October Term, 1992

STATE OF MINNESOTA,

Petitioner,

vs.

TIMOTHY E. DICKERSON,

Respondent.

ON WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Does the rule of *Terry v. Ohio*, 392 U.S. 1 (1968) permit a police officer to perform a "pat frisk" for evidence, and then, upon discovering an item in a detainee's pocket which is clearly not a weapon, to manipulate the item, remove it, inspect it and only then arrest the detainee for possession of the item?

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TABLE OF AUTHORITIES

Cases:

STATEMENT OF THE CASE

Respondent Timothy E. Dickerson wishes to note the same objections to the statements of the case and facts as he did in his brief in opposition.[1]

Respondent additionally objects to this statement in Petitioner's Statement of the Case: "Having probable cause to believe the object was contraband, Officer Rose seized the object from Respondent's pocket." Petitioner's Brief on the Merits at 4. That statement does not appear in the trial court's findings nor in either opinion of the Minnesota appellate courts.

Respondent also wishes to note that the building from which the officers saw him leaving was a twelve-unit apartment building.

SUMMARY OF THE ARGUMENT

I. The Court's writ of certiorari should be dismissed as improvidently granted for three reasons. The first is that the case has become moot, and presents no "case or controversy" within the meaning of Article III, § 2 of the United States Constitution. The trial court's order issued after the Minnesota Supreme Court's decision in this case vacated the deferred adjudication and dismissed the case. That order rendered this case moot as defined in *Church of Scientology v. United States*, ___ U.S. ___, 61 U.S.L.W. 4003 (U.S. Nov. 16, 1992). Moreover, by order this Court dismissed a writ of certiorari as improvidently granted in *Montana v. Imlay*, ___ U.S. ___, 113 S.Ct. 444 (1992). By the time *Imlay* was heard by this Court, it had a procedural history in terms of mootness strikingly similar to this case.

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[1]Respondent mistakenly characterized the piece of crack in his brief in opposition as "less than an ordinary household 200-milligram aspirin tablet . . ." Brief in Opposition at xii. Actually, it weighs the same.

The second reason why the writ should be dismissed is that the Petitioner has argued in its brief on the merits issues not preserved below. Since the issues were not preserved below, this Court lacks jurisdiction to hear them under 28 U.S.C. § 1257 (a) (1988).

The third reason why the writ should be dismissed is that the Petitioner has argued in its brief on the merits issues not raised in its petition for certiorari. This Court generally declines to hear issues not raised in the petition unless they are either necessary to resolution of the issue on which the writ was granted or essential to analysis of the decision below or to the correct disposition of other issues.

II. The Minnesota appellate courts properly applied the rule of *Terry v. Ohio*, 392 U.S. 1 (1968). This Court and lower courts throughout the country have uniformly held that a search for evidence cannot be justified by a *Terry* analysis, and that *Terry* does not permit removal and inspection of items which do not feel like weapons.

III. The search in this case cannot be supported as a sense-based search or seizure upon probable cause. There is no "search on probable cause" exception to the warrant requirement. This Court should not adopt a "plain-feel" exception to the warrant requirement.

The thoroughly-probing and manipulative search of the miniscule item in Respondent Dickerson's pocket was a "second" search within the meaning of *Arizona v. Hicks*, 480 U.S. 321 (1987).

Probable cause cannot be based solely on the sense of touch, though it may be based upon smell, hearing and sight. Observations by smell, hearing and sight are usually not searches. However, detection of items by the use of the sense of touch is a search and an intrusion into personal privacy which the law permits only in very narrow circumstances. *United States v. Robinson*, 414 U.S. 218 (1973); *Terry v. Ohio*, 392 U.S. 1 (1968). Detection of items by use of the sense of touch also does not provide

immediate information to the police officer, and is not as reliable as the sense of smell, hearing or sight.

The observation of an item in "plain-view" is not the constitutional equivalent of the detection of an item by the sense of touch. "Plain-view" is not a search, but "plain-feel" is. Small items concealed in a pocket of clothing are not "immediately apparent" within the meaning of the "plain-view" cases. For these reasons, the officer did not have probable cause to perform a "plain-view"-like seizure in this case. The Court's prior "plain-view" observations in *Texas v. Brown*, 460 U.S. 730 (1983) and in *Michigan v. Long*, 463 U.S. 1032 (1983) do not control the issues in this case because this case is not a "plain-view" case.

This case is also not controlled by the "search incident to arrest" rules, which is an issue the State failed to preserve below. This Court's decision in *Rawlings v. Kentucky*, 448 U.S. 98 (1980) does not control this case.

Respondent has no burden to demonstrate the unlawfulness of the search.

ARGUMENT

I. THE COURT SHOULD DISMISS ITS WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED.

This Court should dismiss its writ of certiorari as improvidently granted for three reasons: 1) the case has become moot, 2) issues briefed by Petitioner were not preserved below, and 3) issues briefed by Petitioner were not encompassed by the petition for writ of certiorari.

A. This Case Is Moot Because The State of Minnesota Has Dismissed Its Case Against Respondent. This Court's Decision Cannot Affect Respondent, But Would Be Merely An Advisory Opinion

This case is moot in that it represents no "case or controversy" within the meaning of Article III of the United States Constitution. Mootness is a jurisdictional question. This Court has no authority to hear a case which does not present a live controversy. U.S. Const. art. III, § 2; Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, Supreme Court Practice 709, 721 (6th Ed. 1986) (*hereinafter,* Stern and Gressman). The mootness rules of this Court, precedent on this question and four mootness cases this Court decided this term all support the dismissal of the Writ of Certiorari in this case.[2]

1. This Court's Recent Mootness Decisions

This Court's recent decision in *Church of Scientology v. United States*, ___ U.S. ___, 61 U.S.L.W. 4003 (U.S. Nov. 16, 1992) directly supports Respondent's mootness argument. That case involved access by the Internal Revenue Service to certain materials. While the case was on appeal, the materials were handed over to the IRS, and the court of appeals then dismissed the appeal as moot. This Court stated:

> It has long been settled that federal court has no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." . . . [citations omitted] . . . For that reason, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant "any effectual relief whatever" to a prevailing party, the [case is moot]. . . *The availability of [a] possible remedy is sufficient to prevent [a] case from being moot.*

Id. at ___, 61 U.S.L.W. at 4004 (emphasis supplied).

In another recent case, this Court dismissed, apparently on mootness grounds, a writ of certiorari as improvidently granted. *Montana v. Imlay*, ___ U.S. ___, 113 S.Ct. 444 (1992). In that case, a defendant convicted of a sex offense was sentenced to probation, conditioned upon his participation in a sex offenders' program. *State v. Imlay*, 813 P.2d 979, 980 (Mont. 1991). Because he would not admit guilt, he was terminated from the program, his probation was revoked and he was sentenced to prison. *Id.* at 981-83. The trial court recommended that he not be eligible for parole until completing the prison's sex-offender program. *Id.* at 982. The Montana Supreme Court held that Mr. Imlay could not be compelled to admit his guilt of the crime for which he was convicted without violating his right against self-incrimination. *Id.* at 985.

This Court granted Montana's petition for certiorari. *Montana v. Imlay*, ___ U.S. ___, 112 S.Ct. 1260 (1992). While that petition was pending, the Montana trial court again sentenced Mr. Imlay to prison, *this time without the condition that he complete the sex-offender program.* The Montana Supreme Court refused to disturb the resentencing after this Court granted certiorari to review its prior ruling. *Imlay v. McCormick*, 829 P.2d 944 (Mont. 1992) (Table).

After the filing of briefs and oral argument, this Court dismissed the writ of certiorari as improvidently granted. The concurring opinion strongly implied that the intervening decision of the Montana trial court, issued *after* the Montana Supreme Court's decision, rendered moot the controversy upon which the writ of certiorari had been

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[2]Respondent's mootness argument also rests upon the authorities argued in his brief in opposition and in his supplemental brief on the petition for certiorari.

granted. *Montana v. Imlay*, ___ U.S. at ___, 113 S.Ct. at 444-45 (Stevens, J., concurring: "At oral argument, neither counsel identified any way in which the interests of his client would be advanced by a favorable decision on the merits--except, of course, for the potential benefit that might flow from an advisory opinion . . . it is not the business of this Court to render such opinions . . . .").

In two other cases decided this term, the Court instructed lower courts to dismiss actions which had become moot. In *Puerto Rican Legal Defense & Educ. Fund, Inc. v. Gantt*, 796 F.Supp. 698 (E.D.N.Y.), *vacated and remanded with instructions to dismiss as moot sub. nom. Gantt v. Skelos*, ___ U.S. ___, 113 S.Ct. 30 (1992), an appeal from the district court was brought from an order dismissing a challenge to New York's congressional redistricting plan. Because proceedings for the 1992 election had already commenced, and because the suit was filed prior to the state's 1992 legislative redistricting, the lower court dismissed the action as moot, and this Court by its action agreed. In *Yellow Freight System Inc. v. United States*, 948 F.2d 98 (2d Cir.), *vacated and remanded with instructions to dismiss as moot*, ___ U.S. ___, 113 S.Ct. 31 (1992), a writ of certiorari was brought from a lower court order which permitted candidates for delegate to a union convention to campaign on the employer's premises. This Court instructed the lower court to dismiss as moot, presumably because the delegate elections, and indeed the union convention, had already occurred. *See Yellow Freight System*, 948 F.2d at 106 n. 4.

2. Applying The Recent Mootness Decisions

In *Montana v. Imlay*, *Gantt v. Skelos* and *Yellow Freight System, Inc. v. United States* an intervening event occurred after, or contemporaneously with, the lower court's decision, which deprived that decision of any live controversy, within the meaning of Article III, by the time

it reached this Court. That is precisely what happened in this case as well. Nothing this Court decides on the merits can provide the State of Minnesota with any remedy reaching any live Article III controversy between it and Timothy E. Dickerson. *See Church of Scientology v. United States*, ___ U.S. ___, 61 U.S.L.W. 4003 (U.S. Nov. 16, 1992).

On May 9, 1990, the Hennepin County District Court found that Respondent Dickerson had possessed a piece of crack cocaine which weighed 0.2 gram (T. 65-66).[3] Acting under Minn. Stat. § 152.18 (1989), the district court deferred any adjudication and placed Mr. Dickerson on probation for two years, until May 9, 1992 (T. 68-69). Respondent appealed the district court's denial of his motion to suppress to the Minnesota Court of Appeals, which ruled in his favor on April 30, 1991. *State v. Dickerson*, 469 N.W.2d 462 (Minn. Ct. App. 1991).

The Minnesota Supreme Court then heard the case and issued its decision on March 20, 1992. *State v. Dickerson*, 481 N.W.2d 840 (Minn. 1992). The clerk of the Hennepin County District Court noted the appellate decisions, but took no steps to toll the running of the probationary period, to vacate the deferred adjudication or to schedule a hearing (J/A 2-4).

Six weeks after the Minnesota Supreme Court decision, on May 6, 1992, the Hennepin County District Court issued an order vacating the deferred adjudication and dismissing the case, according to the original terms of the sentence and Minn. Stat. § 152.18 (1989). The filing of that order was an intervening act which rendered further appellate proceedings before this Court moot, just as the intervening

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[3] "T" refers to the one-volume transcript of the evidentiary hearing on February 20, 1990, the district court's ruling on March 9, 1990, the March 13, 1990 hearing at which a pre-plea investigation was ordered and the stipulated trial and remaining proceedings on May 9, 1990. "J/A" refers to the Joint Appendix filed in this Court by the parties under Rule 26.

trial court order in *Montana v. Imlay* and the intervening elections in *Gantt v. Skelos* and *Yellow Freight Systems, Inc. v. United States* rendered those cases moot.

The district court's vacate-and-dismiss order contained no reference to the course of Respondent Dickerson's state-court appeal, and was issued, not because of the appeal, but because of Respondent's successful completion of the period of deferred adjudication. However, if the district court had issued its order vacating the deferred adjudication *because of* the state appellate proceedings, the State of Minnesota's appeal would not be moot. That is because, if it prevailed before this Court, the State would "obtain a remedy," *viz.*, vacation of the district court's order. *Church of Scientology v. United States*, ___ U.S. at ___, 61 U.S.L.W. at 4004. However, if the State of Minnesota prevails on the merits before this Court, it obtains nothing related to this case, because the criminal proceedings have been dismissed *for reasons unrelated to the appeal.* Nothing the State could obtain before this Court relates to any Article III case or controversy between it and Respondent. At best, the State would obtain an opinion with which it could advise its police officers. However, "it is not the business of this Court to render [such] advisory opinions . . . ." *Montana v. Imlay*, ___ U.S. at ___, 113 S.Ct. at 445 (Stevens, J., concurring).

The State of Minnesota claimed in its reply brief (on the petition for certiorari) that, regardless of the deferred adjudication given Respondent, he will suffer adverse collateral criminal consequences related to this proceeding, if he should again be charged with a controlled-substance offense. The State based this claim upon this Court's decision in *Pennsylvania v. Mimms*, 434 U.S. 106, 108 n. 3 (1977). However, as more thoroughly discussed in Respondent's Supplemental Brief at 5-7, this claim lacks foundation.

Nothing in Minnesota law precludes Respondent from obtaining a second deferred adjudication. In fact, the

Hennepin County courts have recently been known to award this type of deferred adjudication even to defendants with prior convictions relating to controlled substances.[4] Moreover, such deferred adjudications do not count as criminal convictions for any purpose under Minnesota law. *See* Respondent's Supplemental Brief, at 5-6.

The State also claimed in its reply brief that a deferred adjudication could be used in federal court under the federal sentencing guidelines. Petitioner's Reply Brief at 6. This type of speculation is wholly inadequate to defeat a mootness claim. *See Murphy v. Hunt*, 455 U.S. 478, 484 (1982) (Court had no reason to believe respondent would again be in position to challenge statute); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (mere possibility that plaintiff might some day return to prison inadequate to defeat mootness).

The fact of the matter is that this now nearly-27-year-old first-offender in state court, who satisfactorily completed the requirements of his deferred adjudication, has never been charged in federal court, and his history shows that he is unlikely to be charged in federal court. Moreover, the miniscule quantity of controlled substance at issue in this case doesn't approach the jurisdictional requirements of a federal prosecution.

Because of the intervening trial court decision which vacated the deferred adjudication in this case, and because the possibility of future adverse collateral criminal consequences relating to this deferred adjudication, is no more than speculative, this case is moot and this Court's writ of certiorari should be dismissed as improvidently granted. *See* Stern and Gressman, *supra* at 288-290 & IP(j) (intervening court decision may justify dismissing writ).

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[4] *State of Minnesota v. R.E.B.*, Hennepin County District Court File No. 90038600 (prior conviction for manufacture or sale of heroin); *State of Minnesota v. G.L.G.*, Hennepin County District Court File No. 90033001 (five prior convictions including one for possession of marijuana).

B. Petitioner Has Briefed Issues Neither Argued Nor Decided In The Minnesota Appellate Courts

In its brief on the merits, the State of Minnesota has made several distinct claims which it neither made to the district court nor to the Minnesota appellate courts. This Court lacks jurisdiction to review claims not made before the Minnesota courts. Therefore, this Court should dismiss the writ of certiorari as improvidently granted.

1. This Court's Issue-Preservation Rules

This Court has consistently held in criminal cases that it will not address issues not preserved in the courts below. *See California v. Acevedo*, ___ U.S. ___, ___ n. 2, 111 S.Ct. 1982, 1987 n. 2 (1991); *Buchanan v. Kentucky*, 483 U.S. 402, 404 n. 1 (1987); *Kentucky v. Stincer*, 482 U.S. 730, 747 n. 22 (1987); *Illinois v. Gates*, 462 U.S. 213, 217-224 (1983); *Hill v. California*, 401 U.S. 797, 805-806 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969). *See generally* Stern and Gressman, *supra* at 157 (it is too late to raise the federal question for the first time before this Court). This rule applies to both criminal defendants and state prosecutors. *Illinois v. Gates*, 462 U.S. at 221-22 (state's failure to raise below a defense to a federal right claimed). However, in rare criminal cases, the Court has considered, over dissent, a claim raised in a different fashion in the courts below. *Wood v. Georgia*, 450 U.S. 261, 264-65 & n. 5 (1981); *Beck v. Alabama*, 447 U.S. 625, 630 n. 6 (1980); *Vachon v. New Hampshire*, 414 U.S. 478, 479 & n. 3 (1974).

Jurisdictional considerations preclude the Court from addressing issues not raised below. This Court's jurisdictional statute states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari

> where . . . any title, right, privilege, or immunity is *specially set up or claimed* under the Constitution . . .

28 U.S.C. 1257(a) (1988) (emphasis supplied). *See also* 16 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Eugene Gressman, Federal Practice and Procedure: Jurisdiction, § 4022 at 697 (West 1977) (*hereinafter*, Wright and Miller I); *Id.* § 4022 at 868-71 (Supp. 1992) (*hereinafter*, Wright and Miller II). *But see Illinois v. Gates*, 462 U.S. at 222 (discussing whether rule is jurisdictional or prudential); Wright and Miller II, *supra* § 4022 at 868-71; Stern and Gressman, *supra* at 144.

In addition to the question of jurisdiction, the Court must consider whether it is prudent to address issues not raised below:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider [the constitutional issue raised] . . . .

Cardinale v. Louisiana, 394 U.S. at 439 (petitioner raised a constitutional challenge to a state statute not addressed below).

A party's failure to preserve an issue below will, however, be excused if the state court below actually considered the issue. *See* Wright and Miller I, *supra* § 4022 at 698; Wright and Miller II, *supra* § 4022 at 875; Stern and Gressman, *supra* at 158 (presumption that issue raised if discussed).[5]

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[5]However, several of the criminal cases cited by Wright and Miller to support such a practice rest upon facts which distinguish them from the present case. *Burch v. Louisiana*, 441 U.S. 130, 133 n. 5 (1979) (although the federal claim was not preserved below, the state supreme

2. The State's Issues Before The District Court

Before the trial court, the State of Minnesota argued in a written memorandum that the stop and frisk were permissible. The State also claimed that the inspection and seizure of the crack cocaine fell within the "plain-view" exception to the warrant requirement, inasmuch as the contents of the bag in Respondent's pocket were "immediately apparent." (J/A 18-23).

In its supplemental memorandum to the district court, the State more particularly argued that the police properly seized the crack cocaine under a so-called "plain-feel" exception to the warrant requirement (J/A 24-26). The State's oral argument at the conclusion of the evidentiary hearing did not vary from its written filings (T. 48-53).

3. The State's Issues Before The Minnesota Appellate Courts

In its brief before the Minnesota Court of Appeals, the State of Minnesota took two positions: first, that the search was permissible as a seizure on probable cause, and second, that the court should adopt a "plain-feel" exception to the warrant requirement. Brief for Respondent before the Minnesota Court of Appeals at 16-25. It also suggested, though, that the "plain-feel" issue need not be reached, because the seizure was permissible as one based on probable cause. *Id.* at 16, 21.

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court addressed it pursuant to a rule of state law); *Beecher v. Alabama*, 389 U.S. 35, 37 n. 3 (1967) (federal claim *was* argued before both the trial court and the state supreme court); *Mallett v. North Carolina*, 181 U.S. 589, 592 (1901) (federal claim *was* presented to the state supreme court. *See also Mills v. Maryland*, 486 U.S. 367, 371 n. 3 (1988) (state appellate court addressed issue as either plain error or under state law which did not require preservation).

Respondent filed a reply brief before the Minnesota Court of Appeals in which he argued that the "seizure on probable cause" issue had not been raised below. Reply Brief before the Minnesota Court of Appeals at 2.[6]

At oral argument before the Minnesota Court of Appeals, the State of Minnesota conceded that it had not argued the "seizure on probable cause" issue before the district court. *State v. Dickerson*, 469 N.W.2d 462, 467 (Minn. Ct. App. 1991). The Minnesota Court of Appeals treated the "seizure on probable cause" argument as one actually suggesting a "search incident" to an arrest on probable cause, and held that it would not address the issue since it was not argued to the district court. *Id.*

The State then petitioned for further review before the Minnesota Supreme Court. In its petition, the State sought review on this issue: "[w]here, during the course of a lawful weapons frisk, [the officer] felt an item that he knew from his sense of touch was crack/cocaine, was [he] justified in seizing the item?" Petition for Further Review at 2. The State also sought review of the court of appeals' refusal to adopt a new "plain-feel" exception to the warrant requirement. Petition for Further Review at 7-8. *The State admitted in this petition that it had not argued any "search incident to arrest" theory before the district court, and argued that the court of appeals mistakenly characterized its "seizure on probable cause" theory as a "search incident to arrest."* Petition for Further Review at 8-9 (emphasis supplied).

The Minnesota Supreme Court granted the State's petition for further review, and confined its review to the

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[6]Even the most generous view of this Court's Rule 14.1(a), which permits the Court to hear argument on subsidiary questions fairly included in the principal question, would not treat the State's "search incident to arrest" question, Petitioner's Brief on the Merits at 25-27, or the Solicitor General's exigent circumstances question, Brief for United States as *Amicus Curiae* at 23 n. 8, as fairly included in the question raised in the petition for certiorari. *See* § I(C) below.

court of appeals briefing without oral arguments (J/A 4). In its March 20, 1992 opinion, the Minnesota Supreme Court affirmed all three of the court of appeals' holdings: the officer's stop was proper; the officer had a right to perform a frisk; and the scope of the officer's frisk was excessive. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992). It did not address the court of appeals' conclusion that the State's "seizure on probable cause" argument was actually a "search incident" to arrest argument which had been waived.

The Minnesota Supreme Court specifically declined to adopt the "plain-feel" exception to the warrant requirement urged by the State. *Id.* at 843-45. It discussed and distinguished a number of its prior decisions which, according to the State, permitted the "plain-feel" search in this case. *Id.* at 845. In doing so, the court discussed its prior decision in *State v. Ludtke*, 306 N.W.2d 111 (Minn. 1981). The court held that *State v. Ludtke* did not ratify the search in this case because *Ludtke* was a "search incident" to an arrest on probable cause. *State v. Dickerson*, 481 N.W.2d at 846.

Notwithstanding the fact that the State, in its petition for further review, specifically waived the "search incident to arrest" theory as applied to this case, the Minnesota Supreme Court, *in dicta*, explained in one paragraph why that theory did not apply to the present case. *Id.*

4. Issue Preservation Rules Applied

In light of these facts, the State failed to preserve either its "search incident to arrest on probable cause" claim or the Solicitor General's exigent circumstances claim in any form before any court below.[7] Neither question

[7]While it is clear that the "search incident" and exigent circumstances arguments were never preserved below, and, in fact, the former was specifically waived as to the former, it is less clear that the State's

should be considered by this Court.

In order to show that the Minnesota appellate courts' failure to mention these issues was not for lack of preservation, the State must show how the issues were raised below. Stern and Gressman, *supra* at 150. It has not done so. Moreover, the State affirmatively waived the "search incident to arrest on probable cause" issue below. In its petition for further review to the Minnesota Supreme Court, the State specifically told the Minnesota Supreme Court that it was *not* arguing a "search incident to arrest" theory. State's Petition for Further Review before the Minnesota Supreme Court at 8-9. That waiver in the court below binds the State before this Court, just as a specific waiver of a claim before this Court binds a party. *See Arizona v. Hicks*, 480 U.S. 321, 326 & n. (1987).

Nor does the mere fact that the Minnesota Supreme Court mentioned the "search incident" rule bring this case within the rule that an issue has been preserved if the state court addresses it. *See* Wright and Miller I, *supra* § 4022 at 698. As noted above, the Minnesota Supreme Court's one-paragraph discussion of "search incident" to arrest is inextricably tied to its discussion of why its prior decision in *State v. Ludtke*, 306 N.W.2d 111 (Minn. 1981) does not ratify the search in question. The fact that a state court may have applied the principle behind a legal issue does not excuse the State's failure to raise that issue, and its actual waiver of that issue in the courts below. *Illinois v. Gates*, 462 U.S. at 222-23.

Therefore, at a minimum, the State's arguments concerning "search incident" and the Solicitor General's argument on exigent circumstances are both improperly

"probable cause seizure based on touch" and its "intrusiveness of touch issues" are not "subsidiary question[s] fairly included [in the principal question]". Rule 14.1(a). The latter two issues were never addressed to the district court.

before this Court for lack of preservation in the courts below.[8] In light of the poor preservation of the State's issues and the dramatic effect upon the law that would flow from this Court's adoption of the State's arguments, it would be better for this Court to wait for another case posing those properly-preserved issues.

C. The Issues Briefed On The Merits Are Not Those On Which The Court Granted Certiorari

In its petition for certiorari, the State of Minnesota sought, and obtained, this Court's writ to decide this question:

> Does the Fourth Amendment to the United States Constitution permit a "plain feel" exception to its warrant requirement clause for seizures of objects where a police officer develops, through the *sense of touch* during a lawful pat down, probable cause to believe that the suspect possesses contraband or other evidence of a crime?

Petitioner's Petition for Certiorari at i (emphasis in original). The State of Minnesota's entire petition argued that the "plain-feel" exception it sought should be adopted by this Court, and described what it perceived as a conflict among the lower courts which had considered the issue. Petitioner's Petition for Certiorari at 10-21.

While the State of Minnesota phrased the issue in its brief on the merits in nearly identical terms, its brief contains discussion of other issues which appear outside the scope of this Court's Rule 24.1(a). Certainly, under this rule, the State's discussion of the "search incident to arrest

[8] *See* footnotes 6 and 7.

on probable cause" theory, which it waived below, is not properly before the Court. *See* Petitioner's Brief on the Merits at 25-27. The Solicitor General's exigent circumstances issue is also outside the scope of the rule and not properly before this Court. Brief for United States as *Amicus Curiae* at 23 n. 8.[9]

This Court's rules have long stated, "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." Rule 14.1(a). The Court's rules indicate that "the brief [on the merits] may not raise additional questions or change the substance of the questions already presented in [the certiorari petition]." Rule 24.1(a). As Stern and Gressman note,

> The purpose of requiring a statement of the questions presented is, of course, to apprise the Court and the respondent of the issues which the petitioner is seeking to have reviewed. The Court's determination of what petitions to grant is based upon the questions presented to it in the petitions. To allow petitioners subsequently to argue other questions would be to subvert the theory underlying the certiorari process: that the Court itself will decide what questions are significant enough for it to hear when it acts upon the petition.

Stern and Gressman, *supra* at 363. It is too late to raise federal issues in the brief on the merits before this Court, after certiorari has been granted on other issues. *Id.* at 158.

The rule that the Court will not consider issues not raised in the petition for certiorari is not jurisdictional. *See* Stern and Gressman, *supra* at 364. It does, however, appear to be one of general practice. The only exception to that rule is that the Court *will* consider issues not presented when "resolution of a 'question of law is a

[9] *See* footnotes 6 and 7.

predicate to intelligent resolution of the question on which [certiorari was granted]' . . ." or issues "not explicitly mentioned but 'essential to analysis' of the decisions below or 'to the correct disposition of the other issues' . . . ." Stern and Gressman, *supra* at 361 (citations omitted).[10]

Aside from the State of Minnesota's claim for the adoption of a so-called "plain-feel" exception to the warrant requirement, none of the issues it briefed were raised in the petition for certiorari or necessary for adjudication of that claim. Thus, the present case is not ripe for plenary review.

Therefore, because the case is moot within the meaning of Article III of the United States Constitution, because some of the State's issues were not preserved in the state courts below, and because some of the issues briefed by the State are not encompassed in the petition for certiorari, this Court should dismiss its writ as improvidently granted.

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[10]While in all the criminal cases cited by Stern and Gressman, *Cuyler v. Sullivan*, 446 U.S. 335, 342 n. 6 (1980); *United States v. Mendenhall*, 446 U.S. 544, 551 n. 5 (1980); *Eddings v. Oklahoma*, 455 U.S. 104, 113 n. 9 (1982), this Court has decided in favor of justiciability, the Court has not been consistent and has often drawn a dissent in doing so. *See Eddings v. Oklahoma*, 455 U.S. at 120 & n. 1 (Burger, C.J., Blackmun, J., White, J., and Rehnquist, J., dissenting); *Vachon v. New Hampshire*, 414 U.S. 478, 481-83 (1974) (Rehnquist, J., Burger, C.J., and White, J., dissenting); *Hill v. California*, 401 U.S. 797, 805 (1971)("The petition for certiorari likewise ignored [an issue briefed on the merits.]").

II. THE MINNESOTA COURTS PROPERLY HELD THAT OFFICER ROSE'S SEARCH OF RESPONDENT VIOLATED *TERRY v. OHIO*

In the event that this Court concludes that the State's search issues are justiciable, Respondent Dickerson wishes to address them.

A. Introduction

The Fourth Amendment protects against unreasonable searches of persons, homes and effects:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This Court has said that "nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of [citizens] . . ." *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969); *accord, Soldal v. Cook County*, ___ U.S. ___, ___, 61 U.S.L.W. 4019, 4021 (U.S. Dec. 8, 1992) (principal object of Fourth Amendment is protection of privacy). The Fourth Amendment requires the government to obtain a lawful warrant prior to any search or seizure, absent a valid exception to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971).

An exception to the warrant requirement was carved out in *Terry v. Ohio*, 392 U.S. 1 (1968). The exception balanced the rights of a suspect stopped on an "articulable suspicion" and the right of police officers safely to conduct an informational stop and frisk where they suspect a

weapon is present. The exception was, by definition, limited to a search for weapons in order to protect the officer. Once the officer determined no weapon was present, the search was to end. *Id.* at 26; *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992).

In this case, the search exceeded the scope of a legitimate *Terry* search for weapons. Once he determined that Mr. Dickerson had no weapon, Officer Rose had no authority to conduct a further search of objects closed inside Mr. Dickerson's jacket pocket in an attempt to establish probable cause to arrest. This further search exceeded the scope of *Terry* and was a clear violation of Mr. Dickerson's right to be free from unreasonable search and seizure.

The Minnesota Supreme Court found that the frisk of Respondent Dickerson went well beyond *Terry*. It found that the officer's probing and manipulative search of the object in Mr. Dickerson's pocket established that he did not know immediately what it was. It also found that the officer, because he wanted to stop Mr. Dickerson to search him for weapons and drugs, intended to violate the limits of *Terry*. *State v. Dickerson*, 481 N.W.2d at 843-44.

In assessing the facts at issue in this case, this Court should defer to the factfinding of the Minnesota Supreme Court. *Sibron v. New York*, 392 U.S. 40, 63 n. 21 (1968) (a search case, in which this Court appeared reluctant to differ with findings below but did so because they were unarticulated "findings" of state appellate court which wrote no opinion); *Arizona v. Fulminante*, ___ U.S. ___, ___, 111 S.Ct. 1246, 1252 (1991) (voluntariness of confession).

B. The Limits Of *Terry v. Ohio*

More than a generation ago, in a case that, like this one, involved a prosecution for a possessory offense (liquor), Justice Jackson, who had participated in the Nuremberg war trials, said:

> These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people . . . deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.

Brinegar v. United States, 338 U.S. 160, 180-81 (1949) (Jackson, J., Frankfurter, J., and Murphy, J., dissenting). *See also Florida v. Meyers*, 466 U.S. 380, 385-86 (1984) (Stevens, J., Brennan, J. and Marshall, J., dissenting).

By the time this Court issues its opinion in this case, 25 years will have elapsed since the seminal decision in *Terry v. Ohio*, 392 U.S. 1 (1968). In that case, Chief Justice Warren recognized that abuse by the police of the field interrogation process was perceived as part of a wholesale harassment of minority groups. The Court noted a survey reporting that field interrogation and frisks were "a severely exacerbating factor in police-community tensions." *Id.* at 14 & n. 11; *see also People v. Collins*, 463 P.2d 403, 405 (Cal. 1970). Yet, time has not alleviated this problem.[11]

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[11]An extreme example of a Minnesota police officer's abuse of the *Terry* rule occurred two years ago when an officer required a detainee not under arrest to disrobe on a public street behind the squad car, so that the officer could search him for drugs. *See* James Walsh, *St. Paul Strip Search Called "Intrusive, Offensive and Unnecessary" By Judge*, Minneapolis Star-Trib. December 6, 1990 at B7.

Terry v. Ohio permits a very limited intrusion into the personal security of a detainee, and balances the indignity of the intrusion against the need to protect the police officer.[12] If this Court adopts the claim made by the State in this case, the strict limits imposed by *Terry*, which granted the police narrow authority for a narrow purpose, will become the exception rather than the rule. Any number of containers carried by most people will be subject to examination, and huge varieties of items perfectly legal to possess, including aspirin and other pills, will be seized and examined.[13]

It is well to remember the facts which led this Court to its decision in *Terry v. Ohio*. In that case, the officer testified that he observed Mr. Terry and his companion make numerous passes back and forth in front of a business, some while looking in the store's windows. They would meet and confer. *Terry v. Ohio*, 392 U.S. at 6. At one point, they walked to a corner and conferred with another man. *Id.* This went on for some time. The officer believed, based upon his experience, that Mr. Terry and his companion were planning a robbery. *Id.* That is what led him to confront Mr. Terry and to frisk him for weapons.

This Court never contemplated that a *Terry* search could be conducted for anything but weapons that could be used to harm the officer or those nearby. Its opinion in *Terry v. Ohio* contains repeated provisos that the Court granted there only a narrowly-limited authority. *Id.* at 27-29.

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[12]Americans For Effective Law Enforcement, *et.al*, claim that this Court should adopt the State's proposed "plain-feel" exception as a "bright line" rule which will guide police officers and ensure their safety. Brief for Americans For Effective Law Enforcement *et.al* as *Amici Curiae* at 8. What *amici* ignore is that this Court created that "bright line" for the protection of police officers in *Terry v. Ohio*.

[13]An ordinary 200 mg. household aspirin weighs the same as the piece of crack cocaine at issue in this case.

One need go no further than the companion case decided the same day to see that the Court never contemplated authorizing a search for evidence of a crime. *Sibron v. New York*, 392 U.S. 40 (1968). There, the officer suspected that Mr. Sibron was distributing narcotics, but did not suspect that he was armed. Upon confronting Mr. Sibron, the officer told Mr. Sibron that "he knew what he was after,"—and reached into Sibron's pocket, removing heroin. *Id.* at 45. The Court held that the search conducted by the officer was so clearly unrelated to the officer's right to frisk for weapons that the search could not stand. *Id.* at 62-65

In the nearly quarter-century since *Terry v. Ohio*, courts considering the issue have almost unanimously held that *Terry* does not give the officer authority to search for evidence. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1049 n. 14 (1983); *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979); *United States v. Santillanes*, 848 F.2d 1103, 1107-1109 (10th Cir. 1988); *State v. Calhoun*, 502 So.2d 808, 813 (Ala. 1986); *State v. Collins*, 679 P.2d 80, 83 (Ariz. Ct. App. 1983); *Commonwealth v. Marconi*, 597 A.2d 616, 620-21 (Pa. Super. 1991), *appeal denied*, 611 A.2d 711 (Pa. 1992); *State v. Broadnax*, 654 P.2d 96, 101 (Wash. 1982); *State v. Hobart*, 617 P.2d 429, 434 (Wash. 1980).[14] Courts, including this Court, have also concluded that *Terry* prohibits the police from seizing or inspecting objects that are not, and could not be, weapons. *See, e.g., Smith v. Ohio*, 494 U.S. 541, 542-43 (1990); *United States v. Thompson*, 597 F.2d 187, 191 (9th Cir. 1979); *People v. Collins*, 463 P.2d 403, 406-407 (Cal. 1970); *People v. Pritchett*, 393 N.E.2d 1157, 1160 (Ill. Ct. App. 1979); *People v. Brockington*, 574 N.Y.S.2d 814, 815 (N.Y. App. Div. 1991); *Lippert v. State*, 664 S.W.2d 712, 721 (Tex. Crim. App. 1984); *Leake v. Commonwealth*, 265 S.E.2d 701, 704

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[14]Other decisions which agree with this point are collected in Table A, Appendix A-1.

(Va. 1980); *State v. Allen*, 606 P.2d 1235, 1236-37 (Wash. 1980).[15]

Many of those courts have disparaged claims by police officers that a particular object could have, by some flight of fancy, contained a weapon and should therefore have been inspected. In *United States v. del Toro*, 464 F.2d 520 (2d Cir. 1972), for instance, the officer conducting a frisk felt, seized and then inspected a folded ten-dollar bill. He said that he felt the bill might contain a knife or razor blade. *Id.* at 521. The court, however, said that under such a rationale, a razor blade could be concealed virtually anywhere, including Mr. del Toro's wallet, which was not inspected. *Id.* at 522. *See also People v. Collins*, 463 P.2d at 406-407 (officer's "fanciful speculation" that soft object might be atypical weapon must be supported by reasons why that detainee would be so armed and why that object feels like an atypical weapon); *People v. Robinson*, 509 N.Y.S.2d 803, 805-806 (N.Y. App. Div. 1986).

Just as in *Sibron v. New York*, 392 U.S. 40 (1968), the officer in this case set out to seek contraband (T. 9), and he never claimed that he observed or felt any type of weapon (T. 20). This testimony convinced the Minnesota Supreme Court that the officer "set out to flaunt the limitations of *Terry*, and he succeeded." *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992). Officer Rose surely knew, the moment he felt it, that the miniscule lump in Mr. Dickerson's jacket pocket was not a weapon. At that point, the frisk should have ended. *State v. Dickerson*, 481 N.W.2d at 844; *see also* 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 9.4(b) at 520 (2d Ed. 1987) (further patting of object is not permissible once officer feels object which is obviously not a weapon) (*hereinafter*, LaFave). Instead, the officer commenced a second search in an effort to locate contraband. Both this

[15]Other decisions which agree with this point are collected in Table B, Appendix A-2.

Court's decision in *Terry v. Ohio* and the monolithic body of national authority noted here clearly support the Minnesota Supreme Court's decision that the officer's search in this case was improper. As the Minnesota Supreme Court noted, "[t]here was never any possibility that the object in [Mr. Dickerson's] pocket was a weapon . . . ." *State v. Dickerson*, 481 N.W.2d 840, 845 (Minn. 1992).

Because the search in this case went well beyond the scope authorized by *Terry v. Ohio*, and was, indeed, a search for evidence (T. 9), the Minnesota Supreme Court properly concluded that the evidence should have been suppressed. This Court should affirm that decision.

III. OFFICER ROSE'S SEARCH IN THIS CASE CANNOT BE SUPPORTED AS A SENSE-BASED SEARCH OR SEIZURE UPON PROBABLE CAUSE

A. Introduction

The State of Minnesota claims that the search in this case was authorized as a "seizure based upon probable cause," which can be formed on the basis of touch. Petitioner's Brief on the Merits at 13-27. Although the State does not admit it, its real argument is for a new exception to the warrant requirement, one which permits the police to "search" on probable cause.[16] The State's position appears to rest principally on this Court's decisions in *Texas v. Brown*, 460 U.S. 730 (1983), *Michigan v. Long*, 463 U.S. 1032 (1983) and upon the following language contained in Professor LaFave's treatise:

[16]The State is technically casting its argument as a "seizure" rather than as a "search" in order to bring its claim within the "plain-view" rules enunciated most recently in *Horton v. California*, 496 U.S. 128 (1990) and *Arizona v. Hicks*, 480 U.S. 321 (1987). For reasons argued herein, "plain-feel" does not come within "plain-view" analysis. The State's argument is really one in support of a "search."

> Assuming the object discovered in the pat-down does not feel like a weapon, this only means that a further search may not be justified under a *Terry* analysis. There remains the possibility that the feel of the object, together with other suspicious circumstances, will amount to probable cause that the object is contraband or some other item subject to seizure, in which case there may be a further search based upon that probable cause.

3 LaFave, *supra* § 9.4(c) at 524 (2d Ed. 1987).[17]

The State's alternate claim is that the search in this case was permissible as a "search incident" to an arrest on probable cause which occurred after the search. Petitioner's Brief on the Merits at 25-27.

The search of Respondent Dickerson's pocket did not fall within a recognized exception to the Fourth Amendment's warrant requirement, because there is no general "search on probable cause" exception. While the search of automobiles has sometimes been upheld due to the mobility of vehicles, this "exigency" exception has never been applied to pedestrians. Nor should it be. The random search of pedestrians based upon the State's new "search on probable cause" exception would be the death of individual liberty and dignity.

There was no justification for the police officer's manipulation of the object enclosed in Respondent's pocket. According to the findings of fact of the Minnesota Supreme Court, Officer Rose did not determine, with any reasonable

[17]At the time LaFave wrote that language, he relied upon only two cases, *State v. Ludtke*, 306 N.W.2d 111 (Minn. 1981) and *State v. Alesso*, 328 N.W.2d 685 (Minn. 1982). The Minnesota Supreme Court has since pointed out that those cases justify no new exception to the warrant requirement. *State v. Ludtke*, the court said, is a "search incident" to arrest on probable cause, and *State v. Alesso* is a self-protective action properly taken under *Terry v. Ohio*. *State v. Dickerson*, 481 N.W.2d 840, 845-46 (Minn. 1992).

degree of certainty, what the tiny object was when he felt it during the *first search*, the pat frisk. This finding is confirmed by the fact that the officer performed the *second search* squeezing and sliding the object with his fingers, before seizing it.

The more intrusive, second search of Mr. Dickerson cannot be justified as a "search incident" to arrest.[18] Here, there was no probable cause to arrest based upon the frisk for weapons which *Terry v. Ohio* permits. Probable cause to arrest cannot be based upon a search which is then justified only by the arrest.

The adoption of the so-called "plain-feel" exception to the warrant requirement which the State urges would permit, in effect, random stops of pedestrians and searches far more intrusive than the simple frisk for dangerous weapons permitted by *Terry v. Ohio*. "Plain-feel" should not be adopted as an exception to the warrant requirement.

B. Although Probable Cause May Be Based Upon Some Human Senses, It Cannot Be Based Solely Upon The Sense Of Touch

It takes no revolution in the law to claim, as does the State, that probable cause may be formed on the basis of some human senses. More than forty years ago, the Court held that probable cause may be formed based upon the sense of smell. *Johnson v. United States*, 333 U.S. 10, 13 (1948). *See also United States v. Johns*, 469 U.S. 478, 482 (1985); *United States v. Haley*, 669 F.2d 201, 203 (4th Cir. 1982). The same is true for the sense of hearing, at least if no artificial amplification is involved, *see* 1 LaFave, *supra* § 2.2(a) at 327-28, and for the sense of sight, *see generally*

[18]In responding to this "search incident" argument, Respondent does so only on the assumption that this Court finds that the State's argument is properly before it and was not waived below.

Horton v. California, 496 U.S. 128 (1990); *Arizona v. Hicks*, 480 U.S. 321 (1987).

At least since *Katz v. United States*, 389 U.S. 347 (1967), an individual does not have a protected privacy interest in that which he knowingly broadcasts to the public. *Id.* at 351. For that reason, when the police obtain information leading to a probable cause determination based upon smell, hearing and sight (assuming they are properly in position to smell, hear and see), they have not conducted a search.

It is debatable whether one can have a privacy interest, protectible under the Fourth Amendment, in contraband that exudes a distinctive odor, *United States v. Johns*, 469 U.S. 478, 486 (1985). Nor can one have a privacy interest in overheard statements, unless he "justifiably relied" on the privacy of those statements. 1 LaFave, *supra* § 2.2(a) at 327. The same is true for objects exposed to public view. The observation of objects in "plain-view" is not a search, and does not invade any privacy interest. *Horton v. California*, 496 U.S. at 133.

A police officer's acts of smelling, hearing and seeing that which is exposed to all do not require an active intrusion into a suspect's personal space or privacy nor do they require the officer to cross a protected threshold. No one expects a police officer to deliberately forego use of these three senses. But, because the use of these senses is passive, the officer has conducted no search.

By contrast, an officer's use of the sense of touch *is* a search. There are numerous distinctions between a police officer's use of the senses of smell, hearing and seeing and an officer's use of the sense of touch.

First, unlike the other three sense-based procedures, an officer's use of the sense of touch requires a physical contact with the suspect. Unlike the use of the other three senses, the law has traditionally authorized an officer's use of touch in only two very specific contexts.

This Court has long recognized that an arrest on probable cause abrogates a suspect's Fourth Amendment right to be free of unreasonable searches. *See United States v. Robinson*, 414 U.S. 218, 235-36 (1973). The Court has also permitted a very limited intrusion upon a detainee when the officer has reason to believe that the detainee is armed and dangerous, either to himself or others nearby. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968). In contrast to an arrest on probable cause, the frisk permitted by *Terry v. Ohio* is a limited intrusion which balances the detainee's Fourth Amendment rights and the officer's need to protect himself. *Id.* at 22-26.

Both of these personal intrusions by touch, in contrast to police officers' use of the other three senses, are searches within the meaning of the Fourth Amendment. *United States v. Robinson*, 414 U.S. at 236; *Terry v. Ohio*, 392 U.S. at 16.

Second, a police officer cannot obtain information by use of the sense of touch without invading a suspect's personal privacy. What a person conceals in his pocket is protected from public view. By concealing an object in his pocket a person manifests his expectation of privacy in the pocket's contents. *See United States v. Ross*, 456 U.S. 798, 822-23 (1982) (Fourth Amendment protects owner of every container that conceals contents from public view); David L. Haselkorn, Note, *The Case Against A Plain Feel Exception To The Warrant Requirement*, 54 U. Chi. L. Rev. 683, 696 (1987), *citing, United States v. Chadwick*, 433 U.S. 1 (1977) (*hereinafter,* Haselkorn).

Third, touch by a police officer is more of an intrusion into a suspect's personal privacy than are smell, hearing and sight. Haselkorn, *supra,* at 695; *State v. Dickerson*, 481 N.W.2d 840, 845 (Minn. 1992).

Fourth, touch does not provide immediate information as does smell of distinctive odors, hearing and sight. Use of the sense of touch requires speculation and is more susceptible to mistake and inaccuracy than the senses of

smell, hearing and sight. Haselkorn, *supra*, at 697; *State v. Dickerson*, 481 N.W.2d 840, 845 (Minn. 1992); *Commonwealth v. Marconi*, 597 A.2d 616, 623 & n. 17 (Pa. Super. 1991), *appeal denied*, 611 A.2d 711 (Pa. 1992); *People v. Chavers*, 658 P.2d 96, 107 (Cal. 1983) (Rose, C.J., concurring and dissenting); *State v. Broadnax*, 654 P.2d 96, 102 (Wash. 1982).

For all of these reasons, the use of the sense of touch by police officers to develop probable cause is entirely different than their use of the senses of smell, hearing and sight to develop probable cause. The State's effort to characterize all sense-based procedures as equivalent simply does not withstand scrutiny.

C. For Development of Probable Cause To Either Search Or Seize, "Plain-View" And The Sense Of Touch Are Not Equivalent For Constitutional Purposes, And Should Not Be Made So

The State claims that its so-called "plain-feel" exception to the warrant requirement is a logical "corollary" to the plain-view exception. Petitioner's Brief on the Merits at 18, 28. The State's position, which argues that an officer who feels contraband may therefore seize it under the "plain-view" rule without a warrant, is mistaken. "Plain-view" is not "a talisman that the police can invoke in order to ward off any constitutional scrutiny[,]" . . . nor does it "justify a cascading series of intrusions." *United States v. Martin*, 941 F.2d 1210 (6th Cir. 1991) (Table-Text in Westlaw). It does not permit "police officers to eviscerate the [F]ourth [A]mendment by performing warrantless searches one layer at a time." *United States v. Most*, 876 F.2d 191, 195 (D.C. Cir. 1989).

A "plain-view" inspection is not an exception to the warrant requirement because an observation by a police officer of an item exposed to public view is not a search,

and compromises no Fourth Amendment privacy interest of the owner of that item. *Horton v. California*, 496 U.S. 128, 133 (1990). A "plain-view" seizure, however, *is* an exception to the warrant requirement as long as probable cause exists. *Arizona v. Hicks*, 480 U.S. 321, 326 (1987).

The State's argument assumes that an officer who feels contraband in a detainee's pocket during a frisk can identify it as contraband as readily as if he sees it. From this flows the State's argument that if the officer can feel contraband he can seize it without a warrant, as if it were in "plain-view", because the detainee has manifested no reasonable expectation of privacy. The argument rests upon two mistaken premises.

The first mistaken premise is that the State assumes that an officer's use of the sense of touch is as good, for probable cause purposes, as is his use of the sense of sight. For reasons noted above, principally those relating to intrusion upon privacy and speculation, that is not true.[19]

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[19]*See* John G. Saxe, *The Blind Men and the Elephant, reprinted in The Poetical Works of John Godfrey Saxe* 111 (Cambridge: Riverside Press, 1882)(emphasis in original)[also (New York: McGraw-Hill, 1963)]:

> It was six men of Indostan
> To learning much inclined,
> Who went to see the Elephant
> (Though all of them were blind),
> That each by observation
> Might satisfy his mind. . .
>
> And so these men of Indostan
> Disputed loud and long,
> Each in his own opinion
> Exceeding stiff and strong,
> Though each was partly in the right,
> And all were in the wrong!
>
> So oft in theologic wars,
> The disputants, I ween,

The second mistaken premise derives from the container cases, many of which rest upon *Arkansas v. Sanders*, 442 U.S. 753, 764 n. 13 (1979), *overruled on other grounds, California v. Acevedo*, ___ U.S. ___, 111 S.Ct. 1982 (1991).[20] However, the State's analogy to the container cases does not withstand analysis.

The most obvious distinction is that the interior of Mr. Dickerson's jacket pocket is not a separate container, and a search of the contents of that pocket can in no measure be compared to the search of, for example, a gun case, such as was suggested in the *Arkansas v. Sanders* dictum or of the lock-picking kit in *United States v. Grubczak*, 793 F.2d 458 (2d Cir. 1986).

More important, though, is the fact that the contents of Mr. Dickerson's pocket, when felt from the outside, are simply not immediately apparent. The container cases all rest upon the notion that, because of the type of container and the manner in which the contents are packaged, the contents are "immediately apparent," which is a requirement of the "plain-view" rule. *See Horton v. California*, 496 U.S. 128, 136 (1990); *Soldal v. Cook County*, ___ U.S. ___, ___, 61 U.S.L.W. 4019, 4023 (U.S. Dec. 8, 1992). *See also People v. Roth*, 487 N.E.2d 270, 271 (N.Y. 1985).

The State's analogy indeed becomes quite strained when it tries to compare the miniscule bit of cocaine in Mr. Dickerson's jacket pocket with the container cases in which the contents were "immediately apparent." In the following

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Rail on in utter ignorance
Of what each other mean,
And prate about an Elephant
Not one of them has seen!

[20]Because the Court's comments in n. 13 were not unique to the facts in that case, the dictum concerning containers the contents of which can be inferred from their outward appearance, is nothing more than traditional "expectation of privacy" analysis and survives this Court's action in *California v. Acevedo*.

cases, easily-distinguishable facts show that the police knew, to a reasonable certainty, what was in the containers after lawfully feeling them from the outside: *United States v. Diaz*, 577 F.2d 821 (2d Cir. 1978) (paper bag with bundles of currency); *United States v. Portillo*, 633 F.2d 1313 (9th Cir. 1980) (handgun in paper bag); *United States v. Ocampo*, 650 F.2d 421 (2d Cir. 1981) (paper bags with bundles of currency overflowing both seen and felt); *United States v. Russell*, 670 F.2d 323 (D.C. Cir. 1982) (handgun in paper bag); *People v. Chavers*, 658 P.2d 96 (Cal. 1983) (handgun in shaving kit); *State v. Ortiz*, 683 P.2d 822 (Hawaii 1984) (handgun in knapsack); *Matter of Marrhonda G.*, 585 N.Y.S.2d 345 (N.Y. App. Div. 1992) (same).[21]

The fact that touch is not as certain as sight, is not as immediate as sight and requires a greater degree of intrusion upon personal privacy than sight is what effectively negates the State's argument.[22] When a police officer lawfully on the premises sees a plastic bag of white powder, a syringe and a triple-beam scale on the coffee table, he knows immediately and certainly what he has seen.[23] By contrast, however, a police officer feeling a tiny lump in a detainee's pocket during a frisk, which is clearly not a weapon, does not know either immediately or certainly what he has felt. Touch, as is shown most directly in the facts of this case, requires suspicious circumstances *and* exploration, manipulation with fingers, squeezing, sliding in the pocket and other intrusive activity before an

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[21]These distinctions also show the folly of claiming that a "plain-feel" exception should be based upon a large number of cases based on a multitude of significantly-differing fact situations.

[22]*See* authorities cited in § III(B).

[23]A number of the so-called "plain-feel" cases, including the one most often cited in support of a search like the one in this case have required that the officer's tactile perceptions provide him "reasonable certainty" that he has felt contraband. *See United States v. Williams*, 822 F.2d 1174, 1184 (D.C. Cir. 1987).

officer can formulate the same probable cause which he can form almost instantly with his eyes.

As applied to "plain-view" analysis, this Court has already held that, assuming the propriety of the initial intrusion, that type of manipulation and exploration is, in fact, a second search which the "plain-view" exception does not support. Conducting that second search, more than anything else, shows that the nature of the object is not "immediately apparent" within the meaning of the "plain-view" rule. *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987). There, this Court held that, although officers were justifiably on the premises, their movement of a piece of stereo equipment in "plain-view" to record serial numbers was a second, impermissible, search, one which "is much more than trivial for purposes of the Fourth Amendment." *Id.* at 325.

Officer Rose's manipulation of the object in Mr. Dickerson's pocket, *after* he had ascertained that no weapon was present, was the same type of second search that this Court ruled impermissible in *Arizona v. Hicks*.[24] It is hard to imagine how, if an officer may not lift up a turntable to copy the serial number, he could subject Mr. Dickerson, under what the State claims is the same exception to the warrant requirement, to the personal intrusion which occurred here.

Moreover, "plain-view" requires that the officer legally be in a position to do the viewing. When Officer Rose began manipulating and sliding the object in Mr. Dickerson's pocket, he was no longer legally in a position to do that, because he had already ascertained that there was no concealed weapon. As one of the most-frequently cited decisions on the "plain-feel" exception noted:

[24]Professor LaFave agrees that Officer Rose's action in this case amounted to the type of "second search" found impermissible in *Arizona v. Hicks*. *See* 1 LaFave, *supra* § 2.2(a) at 54 (Supp. 1993).

> The requirement of a lawful "vantage point" suggests a corollary limitation: the doctrine would not sanction any use of the sense of touch beyond that justified by the initial contact with the container. For example, an officer who satisfies himself while conducting a *Terry* check that no weapon is present in a container is not free to continue to manipulate it in an attempt to discern the contents.

United States v. Williams, 822 F.2d 1174, 1184 (D.C. Cir. 1987); *United States v. Most*, 876 F.2d 191, 195 (D.C. Cir. 1989).

D. The Sense Of Touch Did Not Provide Probable Cause For A "Plain View"- Like Seizure In This Case

There may perhaps be instances under which an officer, given suspicious circumstances, might be able to develop probable cause by use of the sense of touch.[25] In this case, however, it is clear that Officer Rose did not have probable cause, either to arrest or to perform a "plain-view" seizure. *See State v. Dickerson*, 481 N.W.2d 840, 844, 846 (Minn. 1992). He did not, upon feeling the object in Mr. Dickerson's pocket, perform an arrest on probable cause. Probable cause is a requirement of the "plain-view" doctrine. *See Arizona v. Hicks*, 480 U.S. 321, 326 (1987); *State v. Vasquez*, 815 P.2d 659, 663 (N.M. Ct. App. 1991); *Harris v. Commonwealth*, 400 S.E.2d 191, 195 (Va. 1991). "Probable cause is the *probability* of criminal conduct, not the *possibility* of criminal conduct[,]" and cannot be formed

[25]*E.g.*, *United States v. Pace*, 709 F.Supp. 948 (C.D.Cal. 1989), *affirmed*, 893 F.2d 1103 (9th Cir. 1990), in which officers performing a consensual frisk found two kilograms of cocaine, packaged like bricks, concealed under an elastic stomach support under a winter coat and sweatshirt.

on the basis of mere speculation. *Commonwealth v. Marconi*, 597 A.2d 616, 622 (Pa. Super. 1991), *appeal denied*, 611 A.2d 711 (Pa. 1992)(emphasis in original). The fact that Officer Rose felt compelled to continue sliding and manipulating the object, knowing that it was not a weapon, shows that he did not have the "reasonable certainty" which courts adopting the "plain-feel" exception require. *See United States v. Williams*, 822 F.2d 1174, 1184 (D.C. Cir. 1987).

Nor were the other elements required for a "plain-view"-like seizure present in this case. The contents of Mr. Dickerson's pocket were not "immediately apparent" to the officer, as shown by his thorough manipulation of the object. *See Horton v. California*, 496 U.S. 128, 136 (1990). Additionally, that manipulation was outside the scope of a lawful *Terry* stop. Since there was no other legal basis permitting the officer to "observe" *i.e.*, see or feel, what the State says he did, this search cannot be justified by the State's proposed "plain-view/feel" analysis. *Horton v. California*, *id.*; *United States v. Williams*, 822 F.2d at 1184.

E. This Court's "Plain-View" Decisions In *Texas v. Brown* And *Michigan v. Long* Do Not Justify This Search

There are at least five reasons why this Court's decision in *Texas v. Brown*, 460 U.S. 730 (1983) does not support the search in this case. First, that case involved an occupant of an automobile, to which different rules apply. *Id.* at 733. By contrast, Mr. Dickerson was stopped while walking in a public alley.

Second, *Brown* involved the seizure of an uninflated balloon after the officer, lawfully in position to do so, saw other indicia of a narcotics violation. *Id.* at 733-34. The Court said that the distinctive character of the balloon

spoke volumes about its contents to the trained eye of the officer. *Id.* at 743.

Here, Officer Rose did not get to this point of the analysis. He could not see what Mr. Dickerson had in his pocket, nor did he see a container, the contents of which were "immediately apparent." Moreover, in this case there were none of the other suspicious circumstances like there were in *Brown*. Here, Mr. Dickerson, after leaving a 12-unit-apartment building shortly after 8:00 p.m., a building at which narcotics-enforcement activity had previously occurred, changed course when he saw the police car.[26] By contrast, there were many suspicious circumstances in *Brown*, including Mr. Brown's furtive movement with his hand, the presence of small plastic vials and the loose white powder and the fact that the balloon in question was tied and had white powder near the knot. *Id.* at 733-34.

Third, *Brown* was a "plain-view" case in which the officer had a right to observe what he did, which observations led to the formation of probable cause. *Id.* at 737-39. Here, the Minnesota courts found that Officer Rose had a right to frisk, but no right to conduct the thoroughly-exploratory second search that he did. *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992). That second search was outside of *Terry* or any other lawful justification. *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987); *United States v. Williams*, 822 F.2d 1174, 1184 (D.C. Cir. 1987).

Fourth, this Court's principal "plain-view" decision, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), suggests that the officer must come to the table with clean hands, *id.* at 469-70. The officer must not know in advance what he wants to seize and intend to seize it, and then rely upon "plain-view" as a pretense. *Id.* at 471. Here, Officer Rose testified that he intended to search Mr. Dickerson for an

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[26] *See* 3 LaFave, *supra* § 9.3(c) at 450-51.

illegal purpose (T. 9), and the Minnesota court so held. *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992)("he set out to flaunt the limitations of *Terry* and he succeeded.").

Fifth, Justice Powell, concurring in *Brown* said that people don't carry innocent items in tied-off, uninflated balloons. That may be true for a balloon, but it isn't true for jacket pockets.

Contrary to the State's claim, Petitioner's Brief on the Merits at 21-22, this Court's decision in *Michigan v. Long*, 463 U.S. 1032 (1983) simply held that an officer who is properly in a position to *observe* contraband does not have to ignore it, just because the justification for his presence is not an evidence-seeking one. *Id.* at 1050. There, after discovering marijuana during a *Terry* search of a vehicle, and arresting the driver, the officers found more marijuana in the trunk while impounding the vehicle. *Id.* at 1036. *Michigan v. Long* said nothing about an officer's use of other senses. Moreover, since the issue in that case was only whether an officer may conduct a *Terry v. Ohio* inspection of a vehicle for weapons after the driver is removed, *id.* at 1037, 1051-52, the Court's language about the observation of contraband is mere dictum.

In light of the fact that neither *Texas v. Brown* nor *Michigan v. Long* control the search issues in this case, the only remaining justification for the State's "seizure on probable cause" is the language from Professor LaFave's treatise. However, as Respondent noted earlier, there simply *is* no exception to the warrant requirement for searches and seizures merely on probable cause. Because of LaFave's reliance on *State v. Ludtke*, 306 N.W.2d 111 (Minn. 1981) when he wrote that language, because the Minnesota Supreme Court has since construed *State v. Ludtke* as a "search incident" to an arrest, and because LaFave cites no other exception to the warrant requirement to support his language, Respondent must assume that the

LaFave argument is itself a "search incident to arrest on probable cause" argument.

F. <u>This Search Cannot Be Justified As A Search Incident To An Arrest On Probable Cause</u>

In support of its "search incident" argument, that Officer Rose acted properly in seizing the crack cocaine before arresting Respondent Dickerson, the State of Minnesota makes the unsupportable claim that it does not matter whether the search preceded the arrest, or whether the arrest preceded the search.[27] Petitioner's Brief on the Merits at 25-26. The Solicitor General joins that argument. Brief for United States as *Amicus Curiae* at 22-23.

Both of these parties cite this Court's language in *Rawlings v. Kentucky*, 448 U.S. 98 (1980):

> Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.

Id. at 111. However, there are two problems with the use of this language to ratify the search in the present case.

The first reason why the quoted language fails to support the search is that both the State and the Solicitor General ignored the footnote appended to the quoted language. That footnote says, "The fruits of the search of petitioner's person were, of course, not necessary to support probable cause to arrest petitioner." *Rawlings v. Kentucky*, 448 U.S. at 111 n. 6.

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[27] This argument assumes that the Court is willing to hear the search-incident argument, irrespective of the justiciability arguments made by Respondent in § I of this brief.

When the footnote is read with the quoted language, the implication of the language is quite different: a formal arrest may follow an incidental search when the arrest is based on factors *other* than what was seized in the search. *See* 2 LaFave, *supra*, § 5.4(a) at 517. The properly-quoted language from *Rawlings v. Kentucky* is, therefore, quite a different proposition than that argued by both the State of Minnesota and the Solicitor General.

Read in this light, the quoted language from *Rawlings* does not disturb the traditional rule that "an incident search may not precede an arrest and serve as part of its justification." *Sibron v. New York*, 392 U.S. 40, 63 (1968). *See also Henry v. United States*, 361 U.S. 98, 104 (1959). This Court reaffirmed that rule only two years ago (ten years after *Rawlings*) when it said:

> That reasoning, however, "justify[ing] the arrest by the search and at the same time . . . the search by the arrest," just "will not do."

Smith v. Ohio, 494 U.S. 541, 543 (1990). As Professor LaFave notes, "[s]uch bootstrapping would render the Fourth Amendment a nullity." 2 LaFave, *supra*, § 5.4(a) at 515; *Anderson v. State*, 553 A.2d 1296, 1301 (Md. Ct. Spec. App. 1989); *see also* 2 LaFave, *supra* § 5.4(a) at 115 (Supp. 1993) (characterizing in this fashion the lower court's ruling in *Smith v. Ohio*: "[i]ncredibly, some courts are unable to grasp this simple point.").

Respondent's conclusion about the quoted language from *Rawlings v. Kentucky* is further supported by the fact that this Court cited to *Cupp v. Murphy*, 412 U.S. 291 (1973) immediately after the quoted language from *Rawlings v. Kentucky*, 448 U.S. at 111. In *Cupp v. Murphy*, this Court held that a search for evidence under Mr. Murphy's fingernails was, in fact, a "search incident" to his arrest on probable cause, probable cause which existed *prior* to the search. *Cupp v. Murphy*, 412 U.S. at 295-96.

The second reason why the quote from *Rawlings v. Kentucky* does not support the search in this case is that the incidental search to which the quoted language refers did not produce the evidence for which Mr. Rawlings was prosecuted. It produced only a knife and some money. Rawlings was convicted of "trafficking in, and possession of, various controlled substances." *Rawlings v. Kentucky*, 448 U.S. at 100. The facts of that case were that officers with a search warrant approached Mr. Rawlings and Ms. Cox. One officer ordered Ms. Cox to empty her purse. She did so, and the contents included a considerable amount of controlled substances. She turned to Mr. Rawlings and told him to "take what was his." Rawlings then claimed ownership of the controlled substances. *Id.* at 101. Mr. Rawlings was then searched, and formally arrested.

These facts show that Mr. Rawlings was formally arrested, not for possession of the money and the knife, but for possession of the controlled substances in Ms. Cox's purse. That is the charge for which he was indicted. *Id.* At the time the police searched him and found the money and the knife, they already possessed probable cause to arrest him for possession of the drugs in the purse. That they had not formally done so, even though they could have, at the time they searched Mr. Rawlings is what this Court treated as inconsequential.

Applying the proper quotation of the *Rawlings v. Kentucky* language to the present case means that *Rawlings* does not support the State's argument. The State claims that Officer Rose's search of Respondent Dickerson was a permissible incidental search even though Mr. Dickerson was not arrested until after the search. However, probable cause to arrest Respondent did not exist, even under the view most favorable to the State, until after Officer's Rose's thoroughly-probing search of Mr. Dickerson's pocket. Since the *Rawlings* language demands reasons for the arrest independent of the search, it does not support the State's and the Solicitor General's views of the present case. *See*

People v. Collins, 463 P.2d 403, 408 (Cal. 1970); *State v. Ruffin*, 448 So.2d 1274, 1279 (La. 1984); *Anderson v. State*, 553 A.2d 1296, 1302 (Md. Ct. Spec. App. 1989); *People v. Hoffman*, 525 N.Y.S.2d 376, 378 (N.Y. App. Div. 1988).

Actually, this Court's decision in *Smith v. Ohio* is much closer to the facts of this case. There, the officer did not have even the slightest probable cause until he inspected Mr. Smith's bag. This court held that the arrest could not be justified by what the officer discovered in the illegal search of the bag. *Smith v. Ohio*, 494 U.S. at 542-43.

For all these reasons, it is clear that the search in this case cannot be sanctioned as a "search incident" which preceded an arrest on probable cause.

G. This Court Should Not Adopt A "Plain Feel" Exception To The Warrant Requirement

This Court should not adopt the State's proposed "plain-feel" exception to the warrant requirement, which would produce further erosion of Fourth Amendment liberty. *Commonwealth v. Marconi*, 597 A.2d 616, 621 (Pa. Super. 1991), *appeal denied*, 611 A.2d 711 (Pa. 1992). The warrant requirement is already so "riddled with exceptions [as to be] basically unrecognizable." *California v. Acevedo*, ___ U.S. ___, ___, 111 S.Ct. 1982, 1992 (1991) (Scalia, J., concurring); *see also State v. Ortiz*, 683 P.2d 822, 825 (Hawaii 1984). The Court should be reluctant to "send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a plain view inspection nor yet a 'full-blown' search." *Arizona v. Hicks*, 480 U.S. 321, 328-29 (1987).

For all the reasons already noted, "plain-feel" "is not a sound extension of 'plain-view' principles. *People v. Chavers*, 658 P.2d 96, 107 (Rose, C.J., concurring and dissenting). Tactile sensations, particularly like the one in this case, "could have been almost *anything*." *Commonwealth v. Marconi*, 597 A.2d at 622. Unlike

"plain-view" perceptions, tactile sensations are open to interpretation. *People v. Chavers*, 658 P.2d at 107 (Rose, C.J., concurring and dissenting). Absent exigent circumstances, the determination of whether those sensations amount to probable cause should be interpreted by a magistrate, not by the officer on the street. *People v. Chavers, id.*; *Johnson v. United States*, 333 U.S. 10, 14 (1948). Unlike other sense-based procedures, "plain-feel" requires a personal intrusion and does not, notwithstanding that intrusion, result in immediate knowledge as to the identity of an item. *State v. Broadnax*, 654 P.2d 96, 102 (Wash. 1982).

H. Respondent Dickerson Has No Burden To Demonstrate The Unlawfulness Of The Search

The State of Minnesota claims that Respondent is at fault for his failure to demand that the evidentiary-hearing judge conduct a demonstration as to exactly what the crack cocaine felt like. Petitioner's Brief on the Merits at 32. This position is meritless. It is now and has always been the State's burden to demonstrate the legality of a challenged arrest or search. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971); *State v. Vasquez*, 815 P.2d 659, 662 (N.M. Ct. App. 1991); *People v. Collins*, 463 P.2d 403, 406 (Cal. 1970); Richard B. McNamara, *Constitutional Limitations On Criminal Procedure*, § 15.12 at 243 (Shepard's 1982).

CONCLUSION

Some say that our society is currently waging a "war on drugs." Throughout our history, the people of the United States have shown themselves willing to make sacrifices in wars where necessary. Whether those wars were waged against internal or external aggressors, or against perceived plagues such as liquor or narcotics, those sacrifices have never included and should not now include the constitutional freedoms to which we are all entitled. As this Court has said, "a country[] preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation." *Ex Parte Milligan*, 71 U.S. (4 Wall.) 107, 126 (1866). *See also Florida v. Bostick*, ___ U.S. ___, ___, 111 S.Ct. 2382, 2389 (1991)("If that 'war [on drugs]' is to be fought, those who fight it must respect the rights of individuals, whether or not those individuals are suspected of having committed a crime.").

This Court cannot adopt the position urged by the State of Minnesota in this case without transforming its landmark holding in *Terry v. Ohio* into the exception rather than the rule. Adoption of the State's position would mean that any number of containers carried by most people will be subject to examination: keycases, change purses, makeup kits, wallets, matchbooks or boxes, film cannisters, cigarette packs and glasses cases. Huge varieties of items perfectly legal to possess will be retrieved and examined: aspirin or other pills, buttons, watch batteries, hard candy, chewing gum, marbles, cigarette lighters, combs, lipstick, thimbles, a small wad of paper, and even lint in one's pocket. To permit the kind of search for which the State seeks this Court's permission would be "to assume that all small objects in [a] pocket could be drugs." *Commonwealth v. Marconi*, 597 A.2d 616, 623 (Pa. Super. 1991), *appeal denied*, 611 A.2d 711 (Pa. 1992).

For all of the reasons noted here, this Court should affirm the Minnesota Supreme Court.

Respectfully submitted,
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December 23, 1992

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No. 91-2019

In the
Supreme Court of the United States
October Term, 1992

STATE OF MINNESOTA,

Petitioner,

vs.

TIMOTHY DICKERSON,

Respondent.

ON WRIT OF CERTIORARI TO THE
MINNESOTA SUPREME COURT

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

ARGUMENT

I.

OFFICER ROSE'S REASONABLE AND CAREFUL PAT SEARCH OF THE OUTER SURFACES OF RESPONDENT'S POCKET WAS PERMISSIBLE UNDER *TERRY*.

A. The Trial Court Record Shows that the Pat Search of Respondent's Pockets did not Exceed the Scope of a Valid *Terry* Pat Search.[1]

The following testimony by Officer Rose, which constitutes the only evidence in the record concerning the scope of the pat search, demonstrates that he conducted a limited and reasonable weapons pat search of Respondent:

> I started down from the shoulders to the underarms. I then went across the waistband and I came back up to the chest and I hit a nylon jacket that had a pocket and the nylon jacket was very fine nylon and as I pat-searched the front of his body I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane.

---

1. Respondent's Brief on the Merits does not contest the findings by the three state courts below that Officer Rose had sufficient grounds to stop Respondent and conduct a weapons pat search of Respondent's person. *See Terry v. Ohio*, 392 U.S. 1, 29-30 (1968).

(T. 9).[2] Officer Rose further testified he did not reach inside Respondent's pocket during this pat search until *after* he identified the lump as crack cocaine (T. 9-10).

Nothing in the record indicates that Officer Rose continued examining the object beyond the point he determined it was not a weapon. Officer Rose was never cross-examined about the scope of the touching nor did Respondent present any evidence to rebut Officer Rose's testimony on this issue.[3] Indeed, Respondent's counsel admitted that "[i]n the officer's testimony *he said right away he knew what he felt was crack*, he never suspected that it was a weapon" (T. 45) (emphasis added).[4]

Like Officer McFadden in *Terry v. Ohio*, 392 U.S. 1 (1968), Officer Rose's pat search simply involved the pat down of "the outer clothing" and was confined "strictly to what was minimally necessary to learn" whether

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2. This testimony is in sharp contrast to the Minnesota Supreme Court's characterization of the pat search as one involving "squeezing, sliding and otherwise manipulating the contents of [Respondent's] pocket." *State v. Dickerson*, 481 N.W.2d 840, 844 (1992) (Pet. App. A-7).

3. Respondent never claimed during either the trial court or state appellate court proceedings that the "feel" of the pocket exceeded the scope of a *Terry* pat search. Instead, Respondent claimed only that if a pat search was authorized, Officer Rose exceeded the scope of the pat search when he placed his hand into Respondent's pocket. *See* Supplemental Memorandum (J.A. 31); Brief for Appellant at 27 and 34, *State v. Dickerson*, 469 N.W.2d 462 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn. 1992).

4. This same concession was made at page 24 of Respondent's Brief in Opposition to Petition for a Writ of Certiorari.

Respondent's pocket contained a weapon. *Id.* at 30.[5] "He did not conduct a general exploratory search for whatever evidence of criminal activity he might find." *Id.* Only after he developed probable cause that Respondent possessed crack cocaine, did Officer Rose invade Respondent's "person beyond the outer surfaces of his clothes." *Id.*[6] His initial touching and reflex examination of the pocket was consistent with the "careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons" authorized by *Terry*. *Id.* at 16.[7] Officer Rose's "simple act of feeling the outline and shape of the lump was permissible under *Terry*." *State v. Dickerson*, 481 N.W.2d 840, 849 (Minn. 1992) (Coyne, J., dissenting) (Pet. App. A-18).

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5. This Court indicated in *Terry* that a weapons pat search did not constitute just a polite patting of the outside clothes, but may well require a significant probing of the detainee's outer clothing. *See Terry v. Ohio*, 392 U.S. 1, 16 n.13 (1968).

6. These facts easily distinguish this seizure from the impermissible seizure found in *Sibron v. New York*, 392 U.S. 40 (1968). The police officer in *Sibron* reached into the suspect's pocket and seized envelopes of heroin despite the absence of both reasonable grounds to believe the suspect was armed and probable cause to believe the suspect possessed contraband. *See id.* at 62-64. In contrast, Officer Rose possessed reasonable suspicion that Respondent was armed, limited the scope of his search to weapons and did not reach into Respondent's pocket until *after* he developed probable cause to believe Respondent possessed crack cocaine.

7. Unless a continued search is justified on other grounds, an officer must cease his examination of an object once he determines it is not a weapon. See Wayne LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.4(c) at 524 (2d ed. 1987); *see generally Terry v. Ohio*, 392 U.S. 1, 29 (1968).

Officer Rose's uncontested testimony demonstrates that his examination of the object was *contemporaneous with and part of a valid pat search*. This coincidental identification of the crack cocaine was not the product of a protracted examination of the pocket. Instead, this identification was the result of Officer Rose's initial touching of the pocket, his extensive experience in feeling crack cocaine through clothing on approximately 75 prior occasions and the totality of the circumstances surrounding the stop (T. 5).

This case does not present the second search problem found in *Arizona v. Hicks*, 480 U.S. 321 (1987). In *Hicks*, it was clear that the officer, in moving the stereo equipment, was conducting a search unrelated to his lawful objective of searching for evidence pertaining to a shooting. *Id.* at 325. In contrast, Officer Rose was clearly acting within his lawful search for weapons when he discovered the contraband. He did not launch a separate search for contraband during his touching of the pocket.

Terry established a "bright line" rule which allows police to conduct a careful examination of a suspect's outer clothing for weapons. Police are required to cease this examination only when they determine that the suspect is unarmed. Officer Rose's pat search of Respondent's pocket was within this "bright line" rule. It is reasonable for officers to conduct an instantaneous and reflex tactile examination of objects encountered during a pat search. Only after Officer Rose obtained probable cause to believe that the object was crack cocaine did a second intrusion occur -- the seizure of the crack cocaine from the pocket.

Because there was probable cause for this seizure, this second intrusion was justified.[8]

B. The Legal Conclusion of the Minnesota Supreme Court Concerning the Scope of the Search Should Be Rejected Because it is Predicated upon the Erroneous Application of the Subjective, rather than the Objective, Standard.

The supreme court's legal conclusion concerning the scope of the search was premised upon the incorrect application of the subjective standard to the search, rather than upon factual findings independent from those made by the trial court.[9] The supreme court explicitly relied upon

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8. The "bright line" rule established in *Michigan v. Long*, 463 U.S. 1032, 1050 (1983), held that police are not required to ignore contraband discovered during a legitimate *Terry* search. Moreover, in *Arizona v. Hicks*, 480 U.S. 321, 326 (1987), this Court stated "'[i]t is well established that under certain circumstances the police may *seize* evidence without a warrant'" if "the initial intrusion" bringing the police within plain view is "one of the recognized exceptions to the warrant requirement." *Id.* (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (emphasis in original)). Since the initial intrusion in this case was permissible as part of a legitimate *Terry* search, seizure of the discovered contraband was permissible. *See* Petitioner's Brief on the Merits, pp. 21-27.

9. The facts concerning the scope of the pat search were *undisputed* at trial and the Minnesota Supreme Court relied upon the same factual record that was before the trial court. *See State v. Dickerson*, 481 N.W.2d 840, 842-43 (Minn. 1992) (Pet. App. A-3-4). The Minnesota Supreme Court did, however, misquote Officer Rose's testimony. Specifically, the supreme court quoted the officer as saying, "I examined it with my fingers and slid it and felt it to be a lump of crack cocaine in cellophane." *Id.* at 843 (Pet. App. A-4) (emphasis added). Officer Rose testified that when he examined the

Footnote cont to next page

Officer Rose's statement that he pat searched Respondent for weapons and "drugs" to justify its conclusion that the weapons pat search exceeded the scope of *Terry*. *Dickerson*, 481 N.W.2d at 844 (Pet. App. A-7). Its consideration of the officer's subjective state of mind, rather than the objective circumstances of the search, is contrary to the constitutional criteria set forth by this Court[10] in *Horton v. California*, 496 U.S. 128 (1990).

Under *Horton*, constitutional review of searches requires the "application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Id.* at 138. Therefore, under this objective standard, Officer Rose is permitted to conduct a careful pat search for weapons consistent with the dictates of *Terry* even if he fully expected to find contraband during the weapons search.[11] *See id.*

More importantly, an objective evaluation of an officer's conduct is necessary to maintain the "bright line" rule for protective pat searches. "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on . . . the specific

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Footnote 9 cont from previous page

crack cocaine "it slid" (T. 9). He never stated he "slid" the crack cocaine.

10. In *Ker v. California*, 374 U.S. 23, 34 (1963), this court noted it will review a state court's conclusions to determine whether the constitutional "criteria established by this Court have been respected."

11. It was entirely reasonable for Officer Rose to suspect that Respondent could be carrying both weapons and drugs. Officer Rose had extensive experience in finding both drugs and weapons at the crack house from which he saw Respondent exit (T. 6-7, 14, 16, 21).

circumstances they confront." *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979). To hold that a reasonable pat search of a suspect's pocket is permissible only when an officer has no expectation of discovering contraband is, at best, needlessly confusing and unworkable. At worst, it imperils an officer's safety. *See generally Illinois v. Andreas*, 463 U.S. 765, 773 (1983) (to be workable, fourth amendment standards "should be objective, not dependent on the belief of individual police officers").

Application of the objective standard shows that Officer Rose developed probable cause to believe Respondent possessed crack cocaine during a valid *Terry* weapons search.[12] The Minnesota Supreme Court's contrary conclusion was predicated upon the erroneous application of the subjective standard and this conclusion should be rejected. *See United States v. Singer Mfg. Co.*, 374 U.S. 174, 192-93 (1963) (rejected lower court conclusions based upon the application of erroneous standard to facts which were essentially undisputed). Consequently, the "plain feel" issue upon which this court granted certiorari is presented by the facts of this case.[13]

12. *See* Argument I.A. of this Brief.

13. The decision by the Minnesota Supreme Court clearly shows both that the supreme court ruled on the propriety of a "plain view" exception to the warrant requirement and that this ruling constituted a holding in the decision. *See State v. Dickerson*, 481 N.W.2d 840, 844-45 (Minn. 1992) (Pet. App. A-8).

II.

THE QUESTION PRESENTED AND ALL SUBSIDIARY QUESTIONS SHOULD BE CONSIDERED ON THE MERITS.

A. All Issues Presented in Petitioner's Brief on the Merits were Presented in the Petition for a Writ of Certiorari.

The Petition for a Writ of Certiorari (hereinafter Petition) raised all of the issues subsequently discussed in Petitioner's Brief on the Merits and the Brief for the United States as Amicus Curiae Supporting Petitioner. In addition to the question presented, the Petition also made references to the subsidiary issues of seizure incident to a probable cause arrest and exigent circumstances.

The Petition stated that warrantless seizures of contraband, under circumstances similar to those found in this case, have been affirmed under the alternate rationale of "search incident to arrest" (Pet. at 19).[14] The exigent circumstances rationale for the warrantless seizure was inherent in the Petition's reference to *Texas v. Brown*, 460 U.S. 730 (1983). The Petition quoted language from *Brown* which stated that requiring a warrant for the probable cause seizure in that case constituted a "'needless inconvenience' . . . that might involve danger to the police

14. Respondent's claim that the Petition did not raise the search incident to arrest issue is contradicted by Respondent's Brief in Opposition to Petition for a Writ of Certiorari where, at pages 38-39 and 44, Respondent acknowledged that Petitioner raised this issue.

and public" (Pet. at 11) (quoting *Brown*, 460 U.S. at 739).[15]

Moreover, the issues of search incident to arrest and exigent circumstances are properly before this Court since they are "subsidiary" issues which are "fairly included" in the question presented. *See* Sup. Ct. R. 14.1. These issues do not require additional factual findings and, if the question presented is answered in the affirmative, simply provide alternate reasons as to why a warrant was not necessary for the seizure of the crack cocaine.

B. All Issues Raised in Petitioner's Brief were Considered by the Minnesota Supreme Court and were Properly Preserved for Consideration by this Court.

(1) Respondent waived consideration of the alleged preservation defects when he failed to raise these defects before certiorari was granted.

Respondent's preservation claims were not raised in his Brief in Opposition to the Petition for a Writ of Certiorari. Consequently, because these claims do not go to jurisdiction, Respondent should be deemed to have waived these alleged preservation defects. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985) (because respondent failed to raise the preservation issue in respondent's brief in opposition to the petition for certiorari, the defect was deemed waived). *See also* Sup. Ct. R. 15.1.

15. An exigent circumstances argument is also found in Petitioner's statement that if a warrantless seizure is not permissible under the circumstances of this case, "a person who police have probable cause to believe possesses crack cocaine *is free to walk away with the crack cocaine*" (Pet. at 14) (emphasis in original).

(2) The Minnesota Supreme Court ruled upon the disputed issues.

The issues of probable cause and seizure incident to arrest were ruled upon by the Minnesota Supreme Court in its decision in this case. *See Dickerson*, 481 N.W.2d at 486 (Pet. App. A-12). Because the Minnesota Supreme Court considered and ruled upon these issues, they were preserved for consideration by this Court on a writ of certiorari regardless of whether they were properly raised by Petitioner before the state courts. *See Mills v. Maryland*, 486 U.S. 367, 371 n.3 (1988).

(3) Petitioner properly preserved the disputed issues below.[16]

Petitioner preserved the probable cause issue at the trial court level. This was inherent in the prosecutor's argument that the seizure was justified under the "plain

16. The Minnesota appellate courts could have properly considered these subsidiary issues, even if Petitioner failed to preserve these issues, since these issues could be decided upon the evidence presented before the trial court. *See Harms v. Independent Sch. Dist. No. 300*, 450 N.W.2d 571, 577 (Minn. 1990) (a new issue may be raised on appeal if it does not depend on any new or controverted facts, is decisive of the controversy and failure to raise it below does not provide either party with an advantage or disadvantage).

feel" exception, a corollary to the plain view doctrine.[17] Probable cause is required for a seizure under the plain view doctrine. "To say otherwise would be to cut the 'plain view' doctrine loose from its theoretical and practical moorings." *Hicks*, 480 U.S. at 326. Consequently, seizures are only permissible under the "plain feel" exception when the sense of touch provides an officer with probable cause to believe that an object is contraband or other evidence of a crime.[18]

Petitioner also preserved the exigent circumstances issue as a justification for the warrantless seizure. In its brief below, Petitioner referred to this Court's holding in *Brown* that the warrantless probable cause seizure was permissible since the delay necessary to obtain a warrant may have endangered both the police and the public. *See* Brief for Respondent at 17, *State v. Dickerson*, 469 N.W.2d 462 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn. 1992) (hereinafter Petitioner's Appellate Court Brief).

In addition, Petitioner preserved the seizure incident to arrest issue. In its memorandum to the trial court, Petitioner stated "the officers had a right to seize the

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17. Although the exact words "probable cause" may not have been used in the trial court, Petitioner's trial court memorandums show that the prosecutor argued the concept of probable cause (J.A. 21-22, 24-26). The prosecutor also explicitly relied upon the holding in *State v. Alesso*, 328 N.W.2d 685, 689 (Minn. 1982), which was based, in part, upon the probable cause exception (J.A. 21-22, 25).

18. Petitioner noted below, both at oral argument before the Minnesota Court of Appeals and in its petition to the Minnesota Supreme Court, that the probable cause argument was preserved at the trial court level. *See* Petition for Review at 8-9 n.8, *State v. Dickerson*, 481 N.W.2d 840 (Minn. 1992).

substance and arrest" Respondent (J.A. 22). Petitioner also raised this issue before the state appellate courts when it relied upon the search incident to arrest holding in *State v. Bitterman*, 232 N.W.2d 91, 94-95 (Minn. 1975). *See* Petitioner's Appellate Court Brief at 17.

More importantly, Petitioner never disavowed a search incident to arrest theory as a justification for seizure of the crack cocaine. Petitioner only conceded that it never claimed that the *initial touching* of the pocket was justified as a search incident to arrest. *See* Petition for Review at 8-9 n.8, *State v. Dickerson*, 481 N.W.2d 840 (Minn. 1992).

Finally, regardless of whether the issues of probable cause, exigent circumstances and seizure incident to arrest were preserved before the Minnesota Supreme Court, these issues are "so connected with [the issues decided by the supreme court] in substance as to form" that they are simply "another ground or reason for alleging the invalidity" of the supreme court's ruling. *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899). Therefore, these issues may be considered on the merits.

III.

THE POSSIBILITY THAT COLLATERAL LEGAL CONSEQUENCES WILL BE IMPOSED UPON RESPONDENT AS A RESULT OF THE TRIAL COURT'S FINDING OF GUILT SHOWS THAT THIS CASE PRESENTS A LIVE CONTROVERSY AND IS NOT MOOT.[19]

"[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Sibron v. New York*, 392 U.S. 40, 57 (1968). This Court has repeatedly "adjudicate[d] the merits of criminal cases in which" the defendant has been discharged from either a probationary or prison sentence. *Id.* at 51. In several cases, this Court has held that a case is not moot if the underlying criminal proceedings may subject the defendant to enhanced sentences in future criminal proceedings. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985); *Pennsylvania v. Mimms*, 434 U.S. 106, 108 n.3 (1977). Such cases are not moot even if the possibility of future criminal proceedings are remote. *See Benton v. Maryland*, 395 U.S. 784, 787-91 (1969).

Here, collateral consequences may still be imposed upon Respondent despite the dismissal of the complaint pursuant to Minn. Stat. § 152.18, subd. 1 (1989).[20]

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19. This issue is also addressed in the Reply Brief that Petitioner submitted to this Court in response to Respondent's Brief in Opposition to Petition for a Writ of Certiorari.

20. This statute is reprinted at Appendix A-2-3 of Petitioner's Brief on the Merits.

When a defendant is discharged pursuant to this statute, "a nonpublic record thereof shall be retained by the department of public safety solely for the purpose of use by the courts in determining the merits of subsequent proceedings against such persons." *Id.*

In holding that a discharge under Minn. Stat. § 152.18 does not render moot an appeal from the underlying finding of guilt, the Minnesota Supreme Court found that a discharged defendant faces a "sufficient 'possibility' of 'adverse collateral legal consequences.'" *State v. Goodrich*, 256 N.W.2d 506, 512 (Minn. 1977). This finding by the state supreme court should be determinative on whether Respondent is subject to collateral consequences following his discharge from probation pursuant to Minnesota law. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983) ("the views of the State's highest court with respect to state law are binding on the federal courts").

In addition, Respondent faces the possibility of adverse consequences in future federal court proceedings. Respondent's deferred adjudication will be included in his criminal history score if he is convicted of a federal offense. *See United States v. Frank*, 932 F.2d 700, 701 (8th Cir. 1991) (held that the inclusion of defendant's prior diversionary disposition under Minn. Stat. § 152.18 was proper). *See also* U.S.S.G. §§ 4A1.1(c) and 4A1.2(f).[21]

Unless the decision of the Minnesota Supreme Court is reversed, Respondent will not be subject to any of the adverse consequences imposed under Minn. Stat. § 152.18. "[T]he prospect of the State's inability to impose" these collateral consequences upon Respondent is "sufficient to

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21. These United States Sentencing Guidelines provisions and their supporting commentary are reprinted at Appendix B-1-4 in Petitioner's Brief on the Merits.

enable the State to obtain review of its claims on the merits here." *Mimms*, 434 U.S. at 108 n.3. Therefore, this case is not moot.[22]

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22. Assuming *arguendo* the instant case is technically moot, it is requested that this Court rule on the merits because the "plain feel" exception is of critical importance to future law enforcement activities and will undoubtedly recur. *See Southern Pac. Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1911) (considered the merits of a moot case since the issue presented was "capable of repetition, yet evading review").

Alternatively, if the "capable of repetition" doctrine is not applicable, then Petitioner respectfully requests that this Court vacate the judgments of the Minnesota Supreme Court and the Minnesota Court of Appeals. *See DeFunis v. Odegaard*, 416 U.S. 312, 320 (1974) (state supreme court judgment in moot case was vacated and remanded "for such proceedings as by that court may be deemed appropriate"). Unless the judgments below are vacated, the State of Minnesota will be unfairly prejudiced in future cases by the precedential effect these judgments will undoubtedly have. *See generally In Re Ghandtchi*, 705 F.2d 1315, 1316 (11th Cir. 1983) (vacated judgment below when a federal criminal case was deemed moot on appeal). *Accord United States v. Sarmiento-Rozo*, 592 F.2d 1318, 1321 (5th Cir. 1979).

CONCLUSION

For the foregoing reasons and for the reasons set forth in Petitioner's Brief on the Merits, the State of Minnesota respectfully submits that the judgment of the Minnesota Supreme Court should be reversed.

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January 25, 1993

No. 91-2019

In the Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF MINNESOTA, PETITIONER

v.

TIMOTHY DICKERSON

ON WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a police officer exceeded the scope of the protective pat-down search permitted under *Terry* v. *Ohio*, 392 U.S. 1 (1968), when he briefly rubbed his fingers over a hard object he felt in the pocket of respondent's jacket.

2. Whether, assuming the officer stayed within the bounds of a *Terry* search, he could seize an object from respondent's jacket without a warrant when his sense of touch provided probable cause to believe that the object was contraband.

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INTEREST OF THE UNITED STATES

This case concerns the scope of the protective pat-down search for weapons authorized by *Terry* v. *Ohio*, 392 U.S. 1 (1968), and the use of the sense of touch during a pat-down search to develop probable cause to believe that an item is contraband. Those questions require the Court to interpret the Fourth Amendment's prohibition of unreasonable searches and seizures. The Court's decision will therefore apply to both state and federal law enforcement activities. The United States accordingly has a significant interest in this case.

STATEMENT

1. Two officers with the Minneapolis, Minnesota, Police Department were on routine patrol in a marked car on the evening of November 9, 1989, when they saw respondent coming out of a known "crack house." Pet. App. A3, B3; 2/20/90 Tr. 6-8. The house was a 12-unit apartment building at which the police had previously seized both drugs and weapons. 2/20/90 Tr. 6-7, 21-22. The officers saw respondent come down the stairs of the building and start walking toward the front sidewalk. Upon seeing the police car and making eye contact with the officers, respondent "abrupt[ly]" turned around and headed toward an alley behind the building. Pet. App. A3, A13; 2/20/90 Tr. 6-8, 13-14.[1]

One of the policemen, Officer Vernon Rose, testified that he became suspicious when he noticed respondent's sudden change in direction, and he decided to "check [respondent] for weapons and contraband." 2/20/90 Tr. 8-9; Pet. App. A3. Officer Rose and his partner drove into the alley. Rose got out of the car, confronted respondent (whom he did not know), and ordered him to submit to a pat-down search. According to Officer Rose (2/20/90 Tr. 9): "[A]s I pat searched the front of his body I felt a lump, a small lump in the front pocket" of respondent's thin nylon jacket. He continued: "I examined it with my

[1] Defendant offered a different version of the events. He said he never saw the police car, never made eye contact with the officers, and went directly down the stairs of the apartment building to the sidewalk leading to the alley. 2/20/90 Tr. 27-30. The trial court, however, believed the police officer's version. Pet. App. C1-C2.

fingers and slid it and it felt to be a lump of crack cocaine in cellophane." *Ibid.* Officer Rose then reached into the pocket and pulled out a small rock of crack cocaine in a knotted sandwich bag. *Id.* at 9-10, 32; 5/9/90 Tr. 64-65; Pet. App. C2.

Officer Rose testified that he had been on the Minneapolis Police force for 14 years and had spent more than 11 years assigned to the north side of the city, where these events occurred. 2/20/90 Tr. 4. Rose also said he had previously "felt [crack] * * * in clothing" between 50 and 75 times and "was absolutely sure that's what it was." *Id.* at 9, 10; see also *id.* at 5-6.

Respondent was charged in the District Court of Hennepin County, Minnesota, with possessing a controlled substance, in violation of Minn. Stat. Ann. § 152.025(2)(1) (West Supp. 1992). Pet. App. D1.

2. Respondent moved to suppress the crack on the ground that it had been seized in violation of the Fourth Amendment. After a hearing, the district court denied the motion. Pet. App. C1-C3. The court concluded, first, that "Officer Rose had a reasonable suspicion based upon objective facts that [respondent] was involved in criminal activity," and that Rose was therefore justified in stopping respondent. *Id.* at C3. That conclusion was based on the fact that respondent was seen coming out of a "known crack house" and that he abruptly changed direction when he saw the police. *Id.* at C4. The court further concluded that "Officer Rose had additional reasonable grounds based upon objective facts to conduct the pat-down search for weapons in the alley." *Id.* at C3. The additional grounds cited by the court were that

respondent had come out of a building where weapons had been seized and that his encounter with the police had occurred in a dark alley. *Id.* at C5.

Finally, the court ruled that "Officer Rose seized the crack/cocaine based upon the feel and touch of the item located in [respondent's] pocket and [that] this seizure was reasonable." Pet. App. C3. Likening the situation to one in which an officer sees contraband in plain view, the court reasoned:

> [T]here is no distinction as to which sensory perception the officer uses to conclude that material is contraband. An experienced officer may rely upon his sense of smell in DWI stops or in recognizing the smell of burning marijuana in an automobile. The sound of a shotgun being racked would clearly support certain reactions by an officer. The sense of touch, grounded in experience and training, is as reliable as perceptions drawn from other senses. "Plain feel," therefore, is no different than plain view and will equally support the seizure here.

Id. at C5.

After a trial based on the hearing record and certain stipulated facts, the district court found respondent guilty. 3/13/90 Tr. 61; 5/9/90 Tr. 65-66. The court deferred entry of judgment and placed defendant on two years' probation. 5/9/90 Tr. 68-69; Pet. 5-6. Upon petitioner's successful completion of probation, the charges against him were dismissed, as

required by state law. Pet. 6; Pet. App. D2; Minn. Stat. Ann. § 152.18(1) (West 1989 & Supp. 1992).[2]

3. The Minnesota Court of Appeals reversed. Pet. App. B1-B12. It agreed with the trial court that "[respondent's] stop was justified," and that "[Officer] Rose had an articulable objective basis to perform a limited pat search." *Id.* at B6, B7. The court of appeals nonetheless concluded that the crack was inadmissible because "the scope of the pat search exceeded constitutional parameters." *Id.* at B7. The court "decline[d] to adopt the plain feel exception in Minnesota" because it believed that "the proper analysis in this case must focus upon the limited purpose associated with a pat search." *Id.* at B10.

4. By a 4-3 vote, the Minnesota Supreme Court affirmed the court of appeals' decision. Pet. App. A1-A24. Like the court of appeals, the supreme court held that "the stop was valid" and that the pat-down search was "justified." *Id.* at A5. With respect to the "remaining issue * * * whether the search was 'carefully limited' as *Terry* requires," the supreme court affirmed the court of appeals' holding that "[the] police exceeded the scope of a *Terry* search." *Ibid.*

In the majority's view, the pat-down search of respondent "went far beyond what is permissible under *Terry*." Pet. App. A5. That view was based on "the officer's testimony that he intended to conduct a

[2] Although the charges against respondent were dismissed, a non-public record of the proceedings is retained "by the department of public safety solely for the purpose of use by the courts in determining the merits of subsequent proceedings against [respondent]." Pet. App. D2; Minn. Stat. Ann. § 152.18 (1) (West 1989 & Supp. 1992).

warrantless search for drugs, combined with his testimony about squeezing, sliding, and otherwise manipulating the contents of [respondent's] pocket." *Id.* at A7. The court held that "[d]uring the course of a frisk, if the officer feels an object that cannot possibly be a weapon, the officer is not privileged to poke around to determine what that object is." *Ibid.*

The court declined to adopt a "'plain feel' exception" to the warrant requirement. Pet. App. A8 n.1. The court initially determined that "[e]ven if [it were to] recognize[] a 'plain feel' exception, the search in this case would not qualify" under the exception. *Ibid.* In any event, the court was unwilling to "extend the plain view doctrine to the sense of touch," for two reasons. First, it believed that "the sense of touch is inherently less immediate and less reliable than the sense of sight." Second, it considered the sense of touch to be "far more intrusive into the personal privacy that is at the core of the fourth amendment." *Id.* at A8.

Three justices dissented "from that part of the decision which holds the trial court erred in admitting the contraband into evidence." Pet. App. A13. In the dissenters' view, Officer Rose's search was "not too intrusive." *Id.* at A18. Rather, Rose's "simple act of feeling the outline and shape of the lump was permissible under *Terry*," because *Terry* justifies a "*careful* exploration" of the suspect's outer clothing. *Ibid.* (quoting, with emphasis, *Terry*, 392 U.S. at 16). The dissenters argued that a police officer may seize contraband during a *Terry* search "if because of the feel of the object and other circumstances it is immediately apparent that the

object, although not a weapon, is contraband." Pet. App. A22.

SUMMARY OF ARGUMENT

I. The Minnesota Supreme Court erred in holding that the police officer who searched respondent exceeded the scope of the protective pat-down search authorized under *Terry* v. *Ohio*. *Terry* authorizes a "careful exploration" of a suspect's outer clothing for weapons. 392 U.S. at 16. Officer Rose's brief and limited touching of the pocket of respondent's jacket was an appropriate part of the "careful" examination permitted under *Terry*. Officer Rose did not engage in the sort of prolonged and intrusive manipulation of clothing about which the state supreme court expressed concern. Nor does the record support the suggestion of the state supreme court that Rose made a discrete, conscious decision to continue handling the object in respondent's pocket after concluding that the object was not a weapon. Instead, the officer's act of feeling the object was merely a continuation of a pat-down search indisputably justified at its inception. For that reason, the officer's actions are distinguishable from the conduct found to constitute a separate, unauthorized search in *Arizona* v. *Hicks*, 480 U.S. 321 (1987).

II. The Minnesota Supreme Court also erred in holding that the sense of touch can never provide probable cause to believe that the object felt is contraband. This Court has recognized that probable cause can be acquired through senses other than the sense of sight. For example, in *United States* v. *Johns*, 469 U.S. 478, 482 (1985), the Court held that the "distinct odor of marihuana" provided probable

cause to believe that the vehicles from which the odor emanated contained contraband. Moreover, this Court's decision in *Terry* is premised on the ability of police officers to detect concealed firearms by touching the outside of a suspect's clothing. Many lower federal courts have held that the sense of touch may provide probable cause to believe that an item is contraband. In holding to the contrary, the court below mistakenly relied on the differences it perceived between the sense of sight and the sense of touch. Those differences do not warrant a categorical prohibition on use of the sense of touch to acquire probable cause.

ARGUMENT

I. OFFICER ROSE WAS CONDUCTING A LAWFUL PAT-DOWN SEARCH WHEN HE ACQUIRED PROBABLE CAUSE TO BELIEVE THAT RESPONDENT POSSESSED CONTRABAND

The Minnesota Supreme Court not only declined as a general matter to recognize a "plain feel" corollary to the "plain view" doctrine; it also held that the crack seized from respondent's pocket would not be admissible under a "plain feel" analysis in any event. Pet. App. A8 n.1. The latter holding was based on the court's view that, in the course of determining that the object in respondent's pocket was crack, Officer Rose exceeded the scope of the protective pat-down search authorized under *Terry* v. *Ohio*, *supra*. To the contrary, we submit that Officer Rose was acting within the scope of *Terry* when he developed probable cause to believe that respondent was in possession of contraband.

At the outset, we agree with the premise underlying the state court's *Terry* holding: A "plain feel" corollary to the "plain view" doctrine would not authorize a police officer to seize evidence without a warrant if the police officer violated the Fourth Amendment in the course of developing probable cause to support the seizure. An "essential predicate" of a seizure based on "plain feel," like one based on "plain view," is that "the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly [felt]." *Horton* v. *California*, 496 U.S. 128, 136 (1990). Thus, if a police officer reaches into a suspect's pocket without reasonable suspicion or probable cause and feels an object that the officer knows to be contraband, the seizure of that object cannot be justified on the ground that the seizure was the product of a "plain feel" of the object. In *Sibron* v. *New York*, 392 U.S. 40, 65 (1968), this Court held that such an intrusion was unlawful, because the intrusion was not justified by reasonable suspicion or probable cause to believe that the suspect had contraband or a weapon in his pocket. The Court therefore ordered suppression of the contraband found in the course of that search.

Officer Rose's conduct, however, was a far cry from the sort of intrusion held to violate the Fourth Amendment in *Sibron*. This was not a case of retroactively justifying a search by what it turned up; rather, because the pat-down search was lawful, the fruits of that search could be considered in determining the lawfulness of Officer Rose's further investigative steps. See *Adams* v. *Williams*, 407 U.S. 143, 148 (1972).

Officer Rose's unrebutted testimony established that his feeling of respondent's jacket pocket was brief and quite limited in scope. As the officer described it, he felt the object in the midst of the pat down, as his hands swept from respondent's shoulders down to his waist and across his chest. 2/20/90 Tr. 9. The officer's feeling of the rock of crack cocaine, as described in the officer's testimony and the district court's findings, Pet. App. C2, C5, was part of the pat-down process, not an independent search or a departure from the process of patting down respondent's clothing. It was thus a part of the "careful exploration" of respondent's outer clothing permitted under *Terry*, 392 U.S. at 16.

The state supreme court acknowledged that the trial court had found "that when the officer felt [respondent's] jacket pocket, he knew immediately he was feeling a plastic bag containing a lump of crack cocaine." Pet. App. A6. Nonetheless, the court chose to characterize the sequence of events quite differently. The court suggested that Officer Rose's search was in effect subdivided into two discrete parts —one part in which the officer found something that he decided was not a weapon, and a second part in which he decided to continue exploring to determine what the object was. Because the court viewed the search as containing two discrete elements, the court readily reached the conclusion that the officer's conduct was unlawful:

> Once it was apparent that the defendant had no weapon, *Terry* ceased to legitimize the officer's conduct. Any further intrusion into the defendant's privacy required a warrant or probable cause to arrest, and the officer had neither. Instead, he continued feeling the defendant's person until he found what he was looking for all along.

Pet. App. A12.

The supreme court's characterization of the record was based on Officer Rose's testimony that he was sure he had discovered crack cocaine when, upon feeling a lump in respondent's jacket pocket, he "examined it with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane." 2/20/90 Tr. 9. But that testimony does not support the state court's view that Officer Rose in effect interrupted his search for weapons to conduct an independent examination of the lump in respondent's jacket pocket. Instead, the testimony supports the district court's finding that Officer Rose immediately concluded that the object in respondent's pocket was crack, and that he did not make an initial determination that the object was not a weapon and then a separate decision to keep searching.[3]

The state court's artificial parsing of Officer Rose's actions reflects the sort of "library analysis"

[3] In holding that Officer Rose exceeded the scope of a valid *Terry* search, the Minnesota Supreme Court erred in relying (Pet. App. A6) on the officer's testimony that he stopped respondent to search for both weapons and drugs. As this Court explained in *Horton*, "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is * * * a valid exception to the warrant requirement." 496 U.S. at 138.

that this Court has cautioned should not guide Fourth Amendment analysis. *United States* v. *Cortez*, 449 U.S. 411, 418 (1981). As a practical matter, a police officer cannot put aside his training and experience in detecting concealed drugs while conducting a pat-down search. Nor should he be required to ignore an object that his experience and training enable him to identify as contraband. To be sure, the limited purpose of a *Terry* search is "to allow the officer to pursue his investigation without fear of violence." *Adams* v. *Williams*, 407 U.S. at 146. Thus, as the Minnesota Supreme Court observed (Pet. App. A7), *Terry* does not authorize the sustained "pinch-[ing] and squeez[ing] and twist[ing] and pull[ing] and rub[bing] * * * [of] a suspect's pocket." But it does not prohibit the momentary manipulation of a suspect's outer clothing that occurred here.

Because Officer Rose's brief manipulation of the object in respondent's pocket was part of the ongoing, legitimate pat-down search, this case is distinguishable from *Arizona* v. *Hicks*, 480 U.S. 321 (1987). In *Hicks*, the Court held that a police officer violated the Fourth Amendment when, during the search of an apartment where a shooting had just occurred, he moved a turntable to see its serial number, based on a reasonable suspicion that the turntable was stolen. 480 U.S. at 324-329. The Court found that the officer's movement of the turntable constituted "a 'search' separate and apart from the search for the shooter, victims and weapons that was the lawful objective of his entry into the apartment." *Id.* at 324-325. The officer's action was "unrelated to the objectives of the authorized intrusion * * * [and]

produce[d] a new invasion of [the defendant's] privacy unjustified by the exigent circumstance that validated the entry." *Id.* at 325. The "search" of the turntable was conceded to have occurred without probable cause. Holding that probable cause was required to support a search under the "plain view" doctrine, the Court concluded that the search of the turntable was unreasonable under the Fourth Amendment.

The movement of the turntable in *Hicks* was wholly distinct from the actions related to the search for the shooter and firearms; here, in contrast, the manipulation of the object in respondent's pocket was merely a continuation of a lawful protective search for weapons.[4] In *Hicks*, the Court discerned a "bright line" (480 U.S. at 339 (O'Connor, J., dissenting)) between the challenged conduct and the conduct related to the objective authorizing the search. No similar line can be drawn in this case.

[4] The distinction between conduct that is part of the pat-down search and conduct that departs from the scope of the search authorized by *Terry* is illustrated by *Leake* v. *Commonwealth*, 265 S.E.2d 701 (Va. 1980). There, a police officer who had stopped a suspect for questioning picked up and shook a rolled-up paper bag that the suspect had set down. The court held that the officer's examination of the bag was not within the scope of the pat-down authority provided by *Terry*.

II. OFFICER ROSE WAS AUTHORIZED TO SEIZE THE CONTRABAND WITHOUT A WARRANT, BECAUSE HIS SENSE OF TOUCH PROVIDED PROBABLE CAUSE TO SUPPORT THE SEIZURE, AND THE SEIZURE WAS JUSTIFIED AS A SEARCH INCIDENT TO AN ARREST

Assuming, as we have argued above, that Officer Rose was acting within the bounds of a lawful *Terry* search when he determined that the object was a rock of crack cocaine, two questions remain: whether the officer's perception of the object through his sense of touch could give rise to probable cause to believe that the item was contraband; and, if so, whether the officer was entitled to seize the object without a warrant. We submit that the answer to both questions is yes.

A. The Sense Of Touch May Provide Probable Cause To Believe That An Item Is Evidence Of A Crime

The Minnesota Supreme Court erred in holding that the sense of touch may never give rise to probable cause to believe that an item is contraband. See Pet. App. A8-A11. This Court has indicated that probable cause may be acquired through senses other than the sense of sight, and the lower courts have squarely and repeatedly held that the seizure of evidence may be supported by probable cause developed through the sense of touch.

The Court has recognized in several cases that probable cause may be established through senses other than sight. For example, in *Johnson* v. *United States*, 333 U.S. 10, 13 (1948), where federal narcotics agents smelled the distinctive odor of burning opium from the hallway outside a hotel room, the Court

rejected the argument that the odor alone was an insufficient basis upon which to issue a search warrant for the room. Similarly, in *Taylor* v. *United States*, 286 U.S. 1, 6 (1932), the Court stated that "[p]rohibition officers [could] rely on [the] distinctive odor" of alcohol "as a physical fact indicative of possible crime." Finally, in *United States* v. *Johns*, 469 U.S. 478, 482 (1985), the Court held that, after police officers "detected the distinct odor of marihuana" emanating from packages in pickup trucks, "they had probable cause to believe that the vehicles contained contraband." *See also United States* v. *Ventresca*, 380 U.S. 102, 111 (1965) ("A qualified officer's detection of the smell of mash has often been held a very strong factor in determining that probable cause exists * * *."); cf. *United States* v. *Place*, 462 U.S. 696, 707 (1983) (specially trained drug-sniffing dog could detect presence or absence of contraband).[5]

Terry v. *Ohio* contains the clearest implication that the sense of touch may provide probable cause to believe that an item is contraband. In *Terry*, the officer "patted down the outer clothing" of the defendant "until he had felt weapons" and thereupon reached into the clothing and seized them. 392 U.S. at 29-30. Thus, the officer never saw the weapons before

[5] In other cases discussing the "plain view" doctrine, the Court has described the doctrine in terms suggesting that it is not limited to what can be perceived through the sense of sight. See *Horton*, 496 U.S. at 137 n.7 ("Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause." (quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 468 (1971)); *Texas* v. *Brown*, 460 U.S. 730, 737, 738 n.4, 739 (1983) (plurality opinion).

he seized them; he only felt them. The Court upheld the seizure of those weapons without a warrant, plainly implying that the feel of the weapons through the clothing, standing alone, furnished probable cause for their seizure. 392 U.S. at 29-31.

Based on this Court's precedents, all of the lower federal courts that have addressed the issue have held that the sense of touch may provide probable cause to believe that the item felt is contraband. See, *e.g.*, *United States* v. *Coleman*, 969 F.2d 126, 132 (5th Cir. 1992); *United States* v. *Buchannon*, 878 F.2d 1065, 1067 (8th Cir. 1989); *United States* v. *Williams*, 822 F.2d 1174, 1181-1186 (D.C. Cir. 1987); *United States* v. *Norman*, 701 F.2d 295, 297 (4th Cir. 1983), cert. denied, 464 U.S. 820 (1983); *United States* v. *Russell*, 655 F.2d 1261, 1264 (1981), modified, 670 F.2d 323 (D.C. Cir.), cert. denied, 457 U.S. 1108 (1982); *United States* v. *Ocampo*, 650 F.2d 421, 428-429 (2d Cir. 1981); *United States* v. *Portillo*, 633 F.2d 1313, 1319-1320 (9th Cir. 1980), cert. denied, 450 U.S. 1043 (1981); see also *United States* v. *Salazar*, 945 F.2d 47, 51 (2d Cir. 1991), cert. denied, 112 S. Ct. 1975 (1992).[6]

[6] Most of the state courts to address the issue have likewise adopted the "plain feel" corollary to the "plain view" doctrine. See, *e.g.*, *People* v. *Chavers*, 658 P.2d 96, 102-104 (Cal. 1983); *People* v. *Lee*, 240 Cal. Rptr. 32, 37 (Cal. Ct. App. 1987); *Henderson* v. *State*, 535 So. 2d 659, 660-661 (Fla. Dist. Ct. App. 1988); *In re Marrhonda G.*, 575 N.Y.S.2d 425, 429-432 (Fam. Ct. 1991); *State* v. *Washington*, 396 N.W.2d 156, 161-162 (Wis. 1986); see also *State* v. *Vasquez*, 815 P.2d 659, 664 (N.M. Ct. App. 1991) (dictum). But see *State* v. *Collins*, 679 P.2d 80, 83-84 (Ariz. Ct. App. 1983); *People* v. *McCarty*, 296 N.E.2d 862, 863 (Ill. App. Ct. 1973); *State* v. *Rhodes*, 788 P.2d 1380, 1381 (Okla. Crim. App. 1990); cf. *Commonwealth* v. *Marconi*, 597 A.2d 616, 621-624 (Pa. Super. Ct. 1991) (dictum), appeal denied, 611 A.2d 711 (Pa. 1992).

The reasons advanced by the Minnesota Supreme Court for declining to follow those decisions are not persuasive. First, the court believed that "the sense of touch is inherently less immediate and less reliable than the sense of sight." Pet. App. A8. As other courts have recognized, however, "[w]hen objects have a distinctive and consistent feel and shape that an officer has been trained to detect and has previous experience in detecting, then touching these objects [may] provide[] the officer with the same recognition his sight would have produced." *United States* v. *Pace*, 709 F. Supp. 948, 955 (C.D. Cal. 1989), aff'd, 893 F.2d 1103 (9th Cir. 1990) (per curiam).

Moreover, whatever sense is used to acquire information, the information must yield the same quantum of objective justification in order to support a seizure: probable cause. Thus, if one sense is ordinarily more informative or reliable than another, that means only that there will be fewer cases in which the less informative or reliable sense will provide probable cause. Nonetheless, probable cause is probable cause, regardless how one comes by it; it is a "fair probability that contraband or evidence of a crime will be found in a particular place," *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983). That probability can be established by seeing, hearing, smelling, touching, or tasting—or by a combination of those senses. See *Johnson* v. *United States*, 333 U.S. at 13 ("If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and

it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant."); *United States* v. *Norman*, 701 F.2d at 297 ("To be obvious to the senses, contraband need only reveal itself in a characteristic way to one of the senses.").

The real concern of the Minnesota Supreme Court appeared to be that the sense of touch does not provide enough information to constitute probable cause as often as does the sense of sight. As *Terry* suggested, however, objects with distinctive shapes, such as guns, can often be identified as easily by touch as by sight. A rock of crack cocaine, on the other hand, may not be easily identified as such by a layman either by sight or touch. Yet, a trained and experienced police officer, such as Officer Rose, may be able to identify crack cocaine easily through either sense. See 2/20/90 Tr. 4-6, 9-10; see also *Brown* v. *Texas*, 443 U.S. 47, 52 n.2 (1979). In short, the question whether information provided by touch provides probable cause must be resolved on the facts of each case, as is true of information provided through the other senses. Each of the five senses has its limits. Nonetheless, concern about those limits should not disqualify a whole category of information, as the court below believed.

The Minnesota Supreme Court also expressed concern that, compared to the sense of sight, the sense of touch is "far more intrusive into the personal privacy that is at the core of the fourth amendment." Pet. App. A8. That concern, however, overlooks a necessary predicate to application of either the plain view doctrine or its "plain feel" corollary. As discussed

above, a police officer must be acting lawfully when he views or touches an object before his observation or feel can justify seizure of the object. See *Horton* v. *California*, 496 U.S. at 136; *Texas* v. *Brown*, 460 U.S. 730, 738-739 (1983). Compare *United States* v. *Coleman*, 969 F.2d at 132 (because officer was allowed to touch pouch inside car as part of *Terry* search for weapons, his discovery of weapon was justified under "plain feel" analysis), with *United States* v. *Most*, 876 F.2d 191, 195-196 (D.C. Cir. 1989) (where officer had no basis for initial touching, discovery of contents through sense of touch was also unlawful, as " '[p]lain touch' analysis is appropriate * * * only after the initial contact has been determined to be lawful"). In the context of a pat-down search, that means that an officer must stay within the bounds of *Terry* both in initiating and in conducting the search. 392 U.S. at 27-28. The officer's compliance with *Terry* ensures against the sort of unconstitutional intrusions about which the court below was concerned.

Here, the officer was justified in touching respondent in the first place, because he had lawful grounds for conducting a pat-down search. The Minnesota Supreme Court specifically held that the pat-down search was justified by reasonable suspicion, Pet. App. A5, and that proposition is not in dispute here. Furthermore, as we have argued above, the officer did not exceed the scope of a lawful *Terry* search when he felt the crack rock in the course of conducting the pat-down search. Under those circumstances, the officer was engaged in lawful conduct when he determined by "plain feel" that the item in the jacket pocket was contraband. His touching of the

object therefore legitimately established probable cause to believe that respondent was committing a crime.

B. Seizure Of The Contraband In Respondent's Pocket Was Justified As A Search Incident To Respondent's Arrest

The final question is whether, having acquired probable cause to believe that respondent possessed crack, Officer Rose was justified in seizing the crack without a warrant. That question reflects the requirement that, in order to seize evidence or contraband, an officer must have "a lawful right of access to the object itself." *Horton* v. *California*, 496 U.S. at 137. We submit that the seizure of the crack in this case was justified as a search incident to the lawful arrest of respondent.

In many plain view cases, a warrantless seizure is permitted because the item in plain view has been left in a public place. In that situation, the seizure of the item does not intrude upon any privacy interest, but only on the possession and ownership interests of the owner. In that setting, probable cause standing alone is enough to justify the seizure. See *Texas* v. *Brown*, 460 U.S. at 738-739; *Payton* v. *New York*, 445 U.S. 573, 587 (1980).

In other cases, however, an object may be in open view but located in a place to which officers do not have an unqualified right of access. See *Horton* v. *California*, 496 U.S. at 137 & n.7; *Texas* v. *Brown*, 460 U.S. at 738; *Payton* v. *New York*, 445 U.S. at 587. For example, in *Taylor* v. *United States*, *supra*, prohibition officers were able to smell whiskey coming from a garage on private property and could see through an

opening in the garage "many cardboard cases which they thought probably contained jars of liquor." 286 U.S. at 5. Those perceptions, coupled with "numerous complaints concerning the use of these premises" for storage of alcohol (*id.* at 6), gave the officers probable cause to believe that there was contraband on the premises. Nonetheless, the Court held that in the absence of exigent circumstances, the officers were required to obtain a warrant before entering the property to seize the liquor. *Ibid.*

Taylor suggests that the access requirement applies whether probable cause is provided by sight, by one of the other senses, or by a combination of senses. To the same effect is *Johnson* v. *United States*, *supra*, where police officers smelled the unmistakable odor of burning opium coming from a hotel room. 333 U.S. at 12. The Court in *Johnson* rejected the argument that "odors cannot be evidence sufficient to constitute probable grounds for any search," stating that an odor "sufficiently distinctive to identify a forbidden substance" could "very well be found to be evidence of the most persuasive character." *Id.* at 13. The Court nonetheless held that the officers were required to obtain a warrant before entering the hotel room. *Id.* at 13-17; see also *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979); *United States* v. *Chadwick*, 433 U.S. 1, 11 (1977); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 468 (1971).[7]

[7] Similarly, when a dog sniff provides probable cause to believe that a piece of luggage contains narcotics, the bag ordinarily may not be opened until a warrant is obtained. See *United States* v. *Place*, 462 U.S. at 701.

The access requirement applies in this case as well. Although Officer Rose acquired probable cause to believe that respondent's jacket pocket contained cocaine, that was not sufficient to justify his reaching into the jacket pocket and seizing the cocaine. The justification for undertaking a *Terry* pat-down search will allow the seizure of a weapon found in the course of that search, but it will not authorize a search for other kinds of evidence of a crime. *Sibron*, 392 U.S. at 65-66; see also *Ybarra* v. *Illinois*, 444 U.S. 85, 93-94 (1979); *Adams* v. *Williams*, 407 U.S. at 146. The seizure of the crack had to be authorized either by a search warrant or by one of the established exceptions to the warrant requirement.

The seizure here was justified as a search incident to respondent's arrest. When Officer Rose acquired probable cause to believe that respondent possessed crack cocaine, he had probable cause to believe that respondent was committing a crime, and he was therefore authorized to arrest respondent for that crime and to conduct a search of respondent's person incident to that arrest. See *New York* v. *Belton*, 453 U.S. 454, 461 (1981); *United States* v. *Robinson*, 414 U.S. 218, 235 (1973). Although the search and seizure of the cocaine preceded respondent's formal arrest, that is not significant under the circumstances of this case. It is true that "an incident search may not precede an arrest and serve as part of its justification." *Sibron* v. *New York*, 392 U.S. at 63; *Smith* v. *Ohio*, 494 U.S. 541, 543 (1990) (per curiam). But where, as here, the police have probable cause to arrest the defendant before conducting the search, and "the formal arrest follow[s] quickly on the heels

of the challenged search," it is not "particularly important that the search precede[s] the arrest rather than vice versa." *Rawlings* v. *Kentucky*, 448 U.S. 98, 111 (1980); accord, *e.g.*, *United States* v. *Miller*, 925 F.2d 695, 698-700 (4th Cir.), cert. denied, 112 S. Ct. 111 (1991); *United States* v. *Potter*, 895 F.2d 1231, 1234 (9th Cir.), cert. denied, 497 U.S. 1008 (1990); *United States* v. *Hernandez*, 825 F.2d 846, 852 (5th Cir. 1987), cert. denied, 484 U.S. 1068 (1988); *United States* v. *Donaldson*, 793 F.2d 498, 502-503 (2d Cir. 1986), cert. denied, 479 U.S. 1056 (1987).[8] The district court was therefore correct in holding that, because Officer Rose had probable cause to believe the object in respondent's jacket pocket was a piece of crack cocaine, it was lawful for him to seize the object and place respondent under arrest.

[8] Alternatively, the seizure of the cocaine from respondent's pocket was justified by exigent circumstances. See *California* v. *Acevedo*, 111 S. Ct. 1982, 1985-1986 (1991); *Mincey* v. *Arizona*, 437 U.S. 385, 394 (1978). If the police had not arrested respondent or searched his pocket on the scene, he would have departed the scene and promptly disposed of the evidence.

CONCLUSION

The judgment of the Minnesota Supreme Court should be reversed.

Respectfully submitted.

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NOVEMBER 1992

No. 91-2019

In The
Supreme Court of the United States
October Term, 1992

STATE OF MINNESOTA,
Petitioner,

vs.

TIMOTHY EUGENE DICKERSON,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF MINNESOTA

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE NATIONAL SHERIFFS' ASSOCIATION, THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, THE STATES OF ALASKA, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, DELAWARE, FLORIDA, INDIANA, KANSAS, LOUISIANA, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, PENNSYLVANIA, SOUTH CAROLINA, UTAH, VIRGINIA, VERMONT,* THE DISTRICT OF COLUMBIA,* PUERTO RICO,* THE SECOND JUDICIAL DISTRICT OF THE STATE

(List of Amici Continued on Inside Front Cover)

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No. 91-2019

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This Brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of consent have been filed with the Clerk of this Court, as required by the Rules. Consent is not required for *amici* states and other political entities pursuant to Rule 37.5.

INTEREST OF AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* over eighty-five times in the Supreme Court of the United States and over thirty-five times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

The National District Attorneys Association (NDAA), is a non-profit corporation and the sole **national** organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all our citizens.

The various state prosecuting attorneys associations that have joined this brief share organizational goals and interests similar to **NDAA**.

States sponsored by their attorney general have joined this brief, as has the District of Columbia, sponsored by its Corporation Counsel, the Commonwealth of Puerto Rico, sponsored by its Solicitor General, and the Second Judicial District of the State of New Mexico, sponsored by the District Attorney.

***Amici* are states, the District of Columbia, the Commonwealth of Puerto Rico, the Second Judicial District of the State of New Mexico, law enforcement officials, and professional associations representing the interests of law enforcement agencies at the state and local levels.** Our members include: (1) attorneys general, other counsel, and prosecutorial officials at the state and local levels who are constitutionally and statutorily engaged in the prosecution of criminal cases, including issues such as those involved in this case; (2) law enforcement officers and law enforcement administrators who are charged with the responsibility of adopting and implementing guidelines for the conduct of detentions for investigation; and (3) police legal advisors and other counsel who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with the law of arrest, search and seizure, and detention for investigation purposes, and to prosecute cases involving evidence obtained thereby.

Because of the composition of our constituencies, constitutional and statutory duties, and relationship with our members—including active law enforcement administrators and counsel at the state and national level—**we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.** We are especially concerned about the impact of the ruling below on the safety of law enforcement officers as they conduct often volatile street stops for investigation. We respectfully ask this Court to consider this information in reaching its decision in this case.

Amici are governmental officials, as well as state and national associations, and our perspective is broad. This Brief concentrates on policy issues, including the values served by the adoption of reasonable rules for guiding police conduct in the law of stop and frisk. Although Petitioner is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these, especially the officer safety issue.

Counsel of Record for *amici curiae*, James P. Manak, Esq., has reviewed the facts of this case and has conferred with counsel for Petitioner in an effort to avoid unnecessary duplication. It is believed that this brief presents vital policy issues that are not otherwise raised.

STATEMENT OF FACTS

The Minnesota Supreme Court ruled in *State v. Dickerson*, 481 N.W.2d 840 (Minn. 1992), that the Fourth Amendment does not admit of a "plain feel" exception to the warrant requirement that would permit a police officer, during the frisk of a suspect for weapons, to retrieve and seize a hard pea-like object on the suspect's person, which felt to the officer like crack cocaine when he touched it through the suspect's clothing. The officer in question, a 14-

year veteran with extensive narcotics experience, stopped the Respondent, hereinafter referred to as "defendant," as he walked away from a known "crack house" and attempted to flee at the sight of the police. When the officer felt the object as part of a proper frisk, he "was absolutely sure" it was crack cocaine in a cellophane package, based upon his experience with similar material in approximately 50 to 75 instances.

Three Justices of the Supreme Court of Minnesota dissented.

ARGUMENT

THE FOURTH AMENDMENT PERMITS A "PLAIN FEEL" EXCEPTION TO ITS WARRANT REQUIREMENT FOR SEIZURES OF OBJECTS, IN A SITUATION IN WHICH A POLICE OFFICER DEVELOPS, THROUGH THE SENSE OF TOUCH DURING A LAWFUL PAT DOWN, PROBABLE CAUSE TO BELIEVE THAT THE SUSPECT POSSESSES CONTRABAND OR OTHER EVIDENCE OF A CRIME.

The issues in this case are relatively simple. There is no question, and the courts below found, that the officer had reasonable suspicion for the stop and frisk under *Terry v. Ohio*, 392 U.S. 1 (1968), *Pennsylvania v. Mimms*, 394 U.S. 106 (1970), *United States v. Cortez*, 449 U.S. 411 (1981), and *Michigan v. Long*, 463 U.S. 1032 (1983). **The only question here is whether the officer could develop, through a sense of touch during a lawful pat down of a suspect, facts that establish probable cause for a search.** If so, the plain view doctrine becomes applicable and evidence is thereby admissible at trial. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), *Texas v. Brown*, 460 U.S.

730 (1983), and *Horton v. California*, __ U.S. __, 110 S.Ct. 2301 (1990).

The court below was reluctant to accord the same value to the sense of touch as that accorded to the other five senses by the majority of courts that have considered application of the plain view doctrine. Its concern—not founded on case law or scientific proof—is stated succinctly at 481 N.W.2d 840, 845 (Minn. 1992):

> Because we do not believe the senses of sight and touch are equivalent, we decline to extend the plain view doctrine to the sense of touch.

The majority of the courts that have considered the precise issue have rejected that position. See, *e.g.*, *United States v. Buchannon*, 878 F.2d 1065, 1066-67 (8th Cir. 1989), and *State v. Washington,* 134 Wis.2d 108, 396 N.W.2d 156, 161-62 (1986). It is certainly not founded on precedents in this Court's Fourth Amendment jurisprudence (indeed this Court, in effect, approved the sense of touch in *Terry v. Ohio, supra*, for a full-blown search after a proper frisk), nor in scientific evidence as a deprivation of the value of information obtained by the sense of touch.

The foremost authority on Fourth Amendment jurisprudence summarizes the legal rule on this subject thusly:

> Assuming the object discovered in the pat-down does not feel like a weapon, this only means that a further search may not be justified under a *Terry* analysis. **There remains the possibility that the feel of the object, together with other suspicious circumstances, will amount to probable cause that the object is contraband or some other item subject to seizure, in which case there may be a further search based upon that probable cause.** (emphasis added).

LaFave, *Search and Seizure*, (2nd ed. 1987) § 9.4(c) at 524. Also see, Holtz, "The 'Plain Touch' Corollary: A Natural

and Foreseeable Consequence of the Plain View Doctrine," 95 *Dickinson Law Rev.*, 521 (1991).

Amici submit that the information developed by a 14-year veteran officer who had felt (and confirmed) the presence of the same sort of contraband object up to 75 times prior to his confrontation with the defendant was more than sufficient to apply this Court's ruling in *Michigan v. Long*, 463 U.S. 1032, at 1050:

> If, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances. *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S.Ct. 2022, 2037, 29 L.Ed.2d 564 (1971); *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S.Ct. 1942, 1949, 56 L.Ed.2d 486 (1978); *Texas v. Brown*, 460 U.S. at 739, 103 S.Ct., at 1541 (plurality opinion by Rehnquist, J.); *id.*, at 746, 103 S.Ct. at 1545 (Powell, J., concurring in the judgment).

Certainly the officer's senses gave him probable cause as surely as probable cause exists when a trained dog's sense of smell indicates the presence of narcotics, as approved by this Court in *United States v. Place*, 462 U.S. 696 (1983).

We submit that the statement of the dissenting Justices in the court below best summarizes this case:

> It is well to remind ourselves occasionally that **"[l]aw enforcement is not a game in which liberty triumphs whenever the policeman is defeated."** E. Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan*, 43 Calif. L.Rev. 565, 582 (1955). Certainly, evidence obtained as the result of any unreasonable search or seizure should be excluded. **But a policeman should not be compelled to ignore what his senses— whether**

sight, sound, smell, taste, or touch—tell him in clear and unmistakable language. (emphasis added).

State v. Dickerson, 481 N.W.2d 840, 851 (Minn. 1992).

There is yet another issue in this case that *amici* wish to address—**officer safety.**

Law enforcement officers are daily faced with highly dangerous street scenarios under their *Terry v. Ohio* common law powers of detention for investigation. We can say unequivocally, **based upon our experience as law enforcement officials and representatives,** that to adopt a rule that tells the police that some forms of their senses with respect to probable cause information during potentially dangerous street confrontations are "good," while other forms are "not good," will not only confuse officers but **will cause them to hesitate under circumstances that could cost them their lives.**

Not only would such a rule defy common sense, it would also be the very opposite of the "bright line" approach that this Court has wisely followed for Fourth Amendment jurisprudence. *Amici* respectfully submit that this Court should not choose that path, one founded on neither scientific evidence, case law, nor any semblance of common sense.

CONCLUSION

Amici urge this Court to reverse the decision of the court below on the basis of the precedents of this Court and sound judicial policy.

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No. 91-2019

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF MINNESOTA,

Petitioner,

—v.—

TIMOTHY DICKERSON,

Respondent.

ON WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE MINNESOTA CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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CONSENT OF PARTIES

Petitioner and respondent have consented to the filing of this brief, and their letters of consent are being filed separately herewith pursuant to Rule 37.3.

INTEREST OF *AMICI*

The American Civil Liberties Union is a national, nonprofit, nonpartisan organization with a membership of nearly 300,000. The Minnesota Civil Liberties Union is one of its state affiliates. The ACLU and its affiliates are dedicated to the preservation and protection of the rights and liberties guaranteed by the Constitution.

The ACLU and its affiliates have a long history of devoting particular attention to preserving the vital rights secured by the Fourth Amendment's proscription against unreasonable search and seizure. This Court's decision will have a significant impact on the search and seizure practices adopted during investigative detentions. *Amici* submits that its experience in Fourth Amendment cases enables it to present a perspective different from the parties and other *amici* on the issues before this Court.

STATEMENT OF THE CASE

On November 9, 1989, Minneapolis police officer Vernon Rose and his partner were on patrol in North Minneapolis. Pet. App. A3; 2/20/90 Tr. 3, 6-7. At 8:15 p.m., the officers observed respondent exit from an apartment building on Morgan Avenue North. Pet. App. A3. After respondent abruptly changed direction, the police decided to stop Mr. Dickerson and "'check [him] . . . for weapons and contraband.'" *Id*. Once the respondent was detained, Officer Rose conducted a pat search, during which he felt a small lump in the pocket of Mr. Dickerson's nylon jacket. Pet. App. A3-A4. Although the lump was certainly *not* a weapon, *see id*. at A10, Officer Rose testified that he nevertheless proceeded to "examine[] [the lump] with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane." 2/20/90 Tr. 9. The officer then reached inside the pocket and removed "what proved to be .20 grams of crack cocaine in a

knotted sandwich-wrap bag. The confiscated material was described as the size of a pea or a marble." Pet. App. A4.

Respondent's motion to suppress this evidence was denied by the trial court, which found the stop valid, and which upheld the seizure of the cocaine under a "plain feel" exception. Pet. App. A2. Thereafter, respondent was convicted of fifth degree possession of a controlled substance. *Id*.

The Minnesota Court of Appeals, in a unanimous decision, upheld the stop, but found that the pat search exceeded the scope of *Terry* v. *Ohio*, 392 U.S. 1 (1968). *See* Pet. App. B6-B7. In so holding, the court declined to establish a "plain feel" exception to the warrant requirement. *Id*. at B10. The Minnesota Supreme Court affirmed, similarly finding a violation of *Terry*. Pet. App. A5. The court also agreed that a "plain feel" exception was unjustified, recognizing that "the sense of touch is far more intrusive [than the sense of sight] into the personal privacy that is at the core of the fourth amendment." *Id*. at A8.

SUMMARY OF ARGUMENT

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court established clear limitations governing warrantless searches of suspects conducted during investigative stops. The *Terry* Court held that a police officer, for his own protection and safety, may conduct a limited pat-down for weapons that he reasonably suspects may be in the possession of the person he has stopped. But "[n]othing in *Terry* can be understood to allow . . . any search whatever for anything but weapons." *Ybarra* v. *Illinois*, 444 U.S. 85, 93-94 (1979). By articulating this carefully tailored limitation, this Court delineated a bright-line rule that balanced the legitimate safety concerns of the police and the privacy interests of the citizenry protected by the Fourth Amendment.

In this case, however, Officer Rose exceeded the scope of *Terry* when he determined that the pea-sized lump in respondent's pocket was clearly *not* a weapon and yet began to squeeze, slide and manipulate the contents of respondent's pocket in an effort to figure out what the lump was. This painstaking search of respondent's pocket could not have been a "mere continuation" of the limited pat-down for weapons authorized by *Terry* for the simple reason that the officer "*never* thought the lump was a weapon," Pet. App. B4 (emphasis added), and only developed his view that the lump was cocaine *after* "manipulating" and "sliding" it. Pet. App. A6. By "taking action" in this way, "unrelated to the objectives of the authorized [*Terry* pat-down for weapons]," Officer Rose clearly "produce[d] a new invasion of respondent's privacy . . . ." *Arizona* v. *Hicks*, 480 U.S. 321, 325 (1987). Recognizing that Officer Rose's search of respondent's pocket violated the well-settled *Terry* standard, the Minnesota Supreme Court properly upheld the suppression of the contraband seized by the police following this illegal search. That judgment should be affirmed.

Petitioner and its supporting *amici* wrongly claim that one "holding" of the Minnesota Supreme Court was that the sense of touch can never provide probable cause to believe that an object felt during a pat-down is contraband. There is no such holding in the court's opinion; all that the Minnesota Supreme Court held was that Officer Rose exceeded *Terry*'s scope by searching respondent's pocket *after* he had assured himself that no weapon was present. Pet. App. A5-A7.

Affirmance of the Minnesota Supreme Court would involve simply a straightforward application of *Terry*, and would not require this Court to hold that the sense of touch can never form the basis for probable cause. Indeed, that "issue" is simply not presented here. The conduct identified as unconstitutional by the Minnesota Supreme Court was *not* Officer Rose's reliance upon his sense of touch but, rather, his expansion of a warrantless search beyond the "'narrow

scope'" authorized by *Terry*. *Ybarra* v. *Illinois*, 444 U.S. at 93 (citation omitted). As the Minnesota Supreme Court properly found, to the extent that Officer Rose eventually developed probable cause to believe that the lump in respondent's pocket was cocaine, he acquired that belief through a search violating *Terry*.

In other cases -- *unlike* this one -- where probable cause to arrest is developed in the course of an appropriately limited *Terry* pat-down for weapons (whether through the sense of touch or otherwise), the police would be entitled to conduct a full-scale search incident to arrest. *See Rawlings* v. *Kentucky*, 448 U.S. 98 (1980). Affirmance of the Minnesota Supreme Court, therefore, would not impose artificial constraints upon legitimate police action. It would, however, ensure that important privacy interests of those who are stopped solely on the basis of reasonable suspicion are protected against unjustified intrusion.

ARGUMENT

I. THE WARRANTLESS SEARCH OF RESPONDENT'S POCKET CONTRAVENED THE FOURTH AMENDMENT BY EXCEEDING THE SCOPE OF *TERRY*

A. A *Terry* frisk is limited solely to a narrowly-tailored search for weapons.

In *Terry* v. *Ohio*, this Court set forth the standard governing pat-downs of temporarily detained suspects: an officer can only conduct a *limited protective* search for weapons (a "frisk") when there is "reason to believe that he is dealing with an armed and dangerous individual . . . ." 392 U.S. at 27. Although subsequent cases have extended

Terry's reach to other contexts,[1] this Court has never deviated from the fundamental rule that a frisk is singularly limited to weapon searches, and thus, *cannot* be conducted simply to locate contraband or evidence of crime.

These principles were reaffirmed in *Ybarra* v. *Illinois*:

> The *Terry* case created an exception to the requirement of probable cause, an exception whose "*narrow scope*" this Court "has been careful to maintain." Under that doctrine a law enforcement officer, for his own protection and safety, may conduct a patdown to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted. . . . Nothing in *Terry* can be understood to allow a generalized "cursory search for weapons" or, indeed, *any search whatever for anything but weapons.*

444 U.S. at 93-94 (emphasis added) (footnotes and citation omitted); *see also Adams* v. *Williams*, 407 U.S. 143, 146 (1972).

This Court's longstanding adherence to the limitations embodied in the *Terry* standard is rooted in the rule's practicality and common sense. *First*, the *Terry* standard offers a clear and straightforward rule that can be readily followed by the law-enforcement community. The line between a limited pat-down for weapons and a full-blown search for any type of contraband or evidence is relatively simple for the police to maintain and for the courts to monitor. In *Arizona*

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[1] *See, e.g., Michigan* v. *Long*, 463 U.S. 1032, 1049-50 (1983) (applying *Terry* to uphold a protective search of the passenger compartment of a vehicle); *Maryland* v. *Buie*, 494 U.S. 325, 331-34 (1990) (relying on *Terry* and *Long* to uphold a "protective sweep" of a private home).

v. *Hicks*, this Court recognized the importance of such bright-line Fourth Amendment rules, observing there that the Court was "unwilling to send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a 'plain-view' inspection nor yet a 'full-blown search.'" 480 U.S. at 328-29 (footnote omitted). By the same token, continued adherence to *Terry*'s bright-line rule will allow the police better to understand the scope of their authority and enable courts to monitor more easily the boundaries of that authority.

Second, although the scope of *Terry* pat-downs is limited, the doctrine recognizes the important and practical concerns of the police -- preserving the safety and security needs of the officer. *See* 392 U.S. at 23-24. There is thus no need for further tinkering with this longstanding doctrine.

Finally, while accommodating police safety concerns, *Terry* also ensures protection for the substantial privacy rights implicated in the search of one's person. The *Terry* Court wisely understood that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Id.* at 24-25. By carefully defining the circumstances in which such searches are permissible and limiting their scope, this Court properly confined such intrusions to serve only the limited objective of assuring police safety.

B. The non-weapon search of respondent's pocket violated *Terry*.

Officer Rose's search for drugs plainly exceeded the scope of *Terry*. During his pat-down of respondent, Officer Rose became certain of one fact: there was no weapon in respondent's pocket. Pet. App. A10. The Minnesota Supreme Court made the following finding: "There was never any possibility that the object in the defendant's pocket

was a weapon . . . ." *See id.* This was also the finding of the Minnesota intermediate appellate court: Officer "Rose never thought the lump [in the pocket] was a weapon." Pet. App. B4. When it became clear that the respondent was unarmed, "*Terry* ceased to legitimize the officer's conduct. Any further intrusion into the defendant's privacy required a warrant or probable cause to arrest, and the officer had neither." Pet. App. A12.

It is clear, moreover, that when Officer Rose *first* touched the pocket during his initial pat-down, he lacked probable cause to believe that drugs were present. *See id.* at A6 (finding that "the officer's 'immediate' discovery [of the contraband] in this case is fiction, not fact"). Indeed, Officer Rose was so uncertain of the pocket's contents that he conducted an independent search, manipulating and sliding the non-weapon object located in the pocket. *See id.* ("The officer testified that he was sure he had found crack cocaine only after (1) feeling a lump, (2) manipulating it with his fingers, and (3) sliding it within the defendant's pocket. That testimony belies any notion that he 'immediately' knew what he had found."). Neither safety concerns nor exigent circumstances necessitated such actions. Officer Rose was simply searching for contraband. In fact, the officer testified that one of his purposes for stopping Mr. Dickerson was to "check him for weapons and contraband." *See* 2/20/90 Tr. 9; *see also id.* ("I pat-searched the party for weapons and contraband.").

The Solicitor General's *amicus* brief, clearly recognizing that an *independent* search of respondent's pocket would violate *Terry*, attempts to rewrite the facts (and ignore the Minnesota Supreme Court's dispositive findings) to suggest there was no further search. However, the court here found that unlike the officer in *Terry*, who "confined his search strictly to what was minimally necessary to learn whether the men were armed," 392 U.S. at 30, Officer Rose conducted an exploratory search for drugs even though it was clear at the

time of this search that respondent was unarmed. Pet. App. A6-A7, A12.[2]

Basic common sense -- and not some "library analysis" -- teaches that a small lump (no bigger than a 200 milligram aspirin tablet) felt in a jacket pocket is *not* a weapon. That much Officer Rose knew when he first felt the lump. But he did not *yet* have any basis to believe the lump was contraband. That is why he conducted a further search. Indeed, on this record, it is impossible to imagine what else Officer Rose could have been doing when he moved and carefully examined the lump other than conducting an independent search for contraband beyond the scope of *Terry*. *See Arizona* v. *Hicks*, 480 U.S. at 324-25 (slight movement of turntable a distinct and separate search from initial search of apartment); *Leake* v. *Commonwealth*, 220 Va. 937, 942, 265 S.E.2d 701, 704 (1980) (Detective's action in "grasping and shaking" a paper bag held by defendant "constituted a prying into hidden places, an exploratory investigation, and an invasion and quest.").

Like the movement of the turntable in *Hicks*, Officer Rose's touching and manipulation of the object hidden in respondent's pocket -- an object clearly *not* a weapon -- "produce[d] a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the" initial pat-down. *Arizona* v. *Hicks*, 480 U.S. at 325. Because

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[2] These factual determinations, of course, should be accorded substantial deference. *See, e.g., Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1252 (1991) ("We normally give great deference to the factual findings of the state court."); *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 351 (1987) ("We . . . customarily accept the factual findings of state courts in the absence of exceptional circumstances."); *see also Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) ("both courts below having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task"); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).

Officer Rose was *not* entitled to "tak[e] action" by moving and manipulating the lump in respondent's pocket, and had no probable cause to believe the lump was contraband *before* taking that action, his search and seizure of it was unlawful under *Hicks*. 480 U.S. at 325; *see also* W. LaFave, 3 *Search and Seizure: A Treatise on the Fourth Amendment* § 9.4(b), at 520 (2d ed. 1987) ("If during a lawful pat-down an officer feels an object which obviously is not a weapon, further 'patting' of it is not permissible.").

This Court applied these same *Terry* principles in *Sibron* v. *New York*, 392 U.S. 40 (1968), where a police officer, during an investigative stop, placed his hand in a suspect's pocket and seized several glassine envelopes of heroin. *See id.* at 45. Even though the officer did not consider the suspect armed and dangerous, he conducted a search solely for narcotics. *See id.* at 46 & n.4, 64. This Court invalidated the search, observing that:

> The search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Only when he discovered such objects did the officer in *Terry* place his hands in the pockets of the men he searched. In this case, with no attempt at an initial limited exploration for arms, [the officer] thrust his hand into Sibron's pocket and took from him envelopes of heroin. His testimony shows that he was looking for narcotics, and he found them. *The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception -- the protection of the officer by disarming a potentially dangerous man.* Such a search violates the guarantee of the Fourth Amendment, which protects the sanctity of the person against unreasonable intrusions on the part of all government agents.

Id. at 65-66 (emphasis added). The facts here are indistinguishable, for while Officer Rose did not initially place his hand inside respondent's pocket, he nonetheless extensively searched the contents of the pocket after he was certain that respondent was unarmed, and did so solely in order to search for drugs.

If this Court were to hold that police officers may continue to pat down suspects even after they have determined -- as here -- that a suspect is unarmed, the effect on legitimate privacy interests would be profound. With such a finding, police would likely consider themselves equipped with a license to manipulate, touch, squeeze and feel a suspect's clothing and all the contents hidden therein during *every Terry* frisk. Such license, however, would ignore what the Minnesota Supreme Court cogently recognized:

> If given long enough, most police officers, or civilians for that matter, could pinch and squeeze and twist and pull and rub and otherwise manipulate a suspect's jacket and figure out what is inside. But the fourth amendment doesn't permit that type of intrusive conduct without a warrant or probable cause to arrest, and police in this case had neither.

Pet. App. A7.

Contrary to petitioner's suggestion, moreover, Officer Rose's manipulation of the hidden object was unquestionably *more* intrusive than the initial pat-down. In *Terry*, this Court noted that a brief protective frisk infringes upon significant privacy interests:

> [I]t is simply fantastic to urge that . . . a [frisk] . . . performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

392 U.S. at 16-17 (footnotes omitted).

Since even a limited pat-down constitutes a substantial privacy intrusion, it follows that a more extended, exploratory search, as occurred here, is an inherently more invasive event. Just as "the 'distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few inches' is much more than trivial for purposes of the Fourth Amendment," *Arizona* v. *Hicks*, 480 U.S. at 325 (citation omitted), so too is there a constitutionally significant difference between a limited protective search of a suspect's outer clothing and an extended manipulation and sliding of an object hidden in a pocket.

Finally, because "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation,'" *Mincey* v. *Arizona*, 437 U.S. 385, 393 (1978) (*quoting Terry* v. *Ohio*, 392 U.S. at 25-26), and since there existed no such exigent circumstances justifying Officer Rose's warrantless search for drugs, both the explicit holding, and the fundamental rationale of *Terry*, compels affirmance.

II. RECOGNITION OF A "PLAIN FEEL" EXCEPTION TO THE WARRANT REQUIREMENT WOULD CONSTITUTE AN UNJUSTIFIED AND UNWISE DEVIATION FROM THE COURT'S FOURTH AMENDMENT JURISPRUDENCE

A. The "plain view" doctrine fails to support the creation of a "plain feel" exception.

Officer Rose's actions cannot be justified under a "plain feel" exception to the Fourth Amendment -- an exception this Court has never recognized. Indeed, this position is so unpersuasive that the Solicitor General's *amicus* brief does not even propose such an exception when attempting to justify the seizure. Although petitioner contends that a "plain feel" exception would be a natural corollary of the "plain view" doctrine, this claim ignores the numerous doctrinal and practical dissimilarities between the two.

1. The incriminating nature of the contraband was not "immediately apparent" to the police.

In *Horton* v. *California*, 496 U.S. 128 (1990), this Court defined the scope of the "plain view" doctrine:

> It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. There are, moreover, two additional conditions that must be satisfied to justify the warrantless seizure. First, *not only must the item be in plain view; its incriminating character must also be "immediately apparent."* . . .

> Second, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself.

Id. at 136-37 (emphasis added) (footnote and citations omitted). The "immediately apparent" requirement is especially significant, since it ensures that "'the 'plain-view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.'" *Id.* at 136 (*quoting Coolidge* v. *New Hampshire*, 403 U.S. 443, 466 (1971) (plurality)).[3]

When the "immediately apparent" requirement is applied to the facts of this case, it is evident that the "plain view" doctrine provides little support for a "plain feel" exception. As shown above, when Officer Rose *initially* felt respondent's pocket during the pat-down, he was not immediately aware that contraband was present, Pet. App. A6 -- a fact which negates any "plain view" analogy here.

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[3] The importance of this requirement is shown by the many "plain view" cases in which evidence is suppressed because its incriminating nature was not "immediately apparent." *See, e.g., United States* v. *Donnes*, 947 F.2d 1430, 1438 (10th Cir. 1991) (because "[t]he 'incriminating character' of the contents of a closed, opaque, innocuously shaped container, such as a camera lens case, is not 'immediately apparent,'" court rejected application of "plain view" exception); *United States* v. *Beal*, 810 F.2d 574, 576-77 (6th Cir. 1987) (affirming suppression of "pen guns" where their incriminating nature was neither "immediate" nor "apparent"); *Moya* v. *United States*, 761 F.2d 322, 326 (7th Cir. 1984) (approving suppression of plastic bag containing drug paraphernalia seized after officers had observed only a corner of the bag; court found that "[t]here is nothing apparently incriminating about a plastic bag"); *United States* v. *Dart*, 747 F.2d 263, 269-70 (4th Cir. 1984); *United States* v. *Szymkowiak*, 727 F.2d 95, 98-99 (6th Cir. 1984).

In this respect, Officer Rose's uncertainty is no different from the uncertainty any officer would face when touching a small, unremarkable object hidden inside a suspect's clothing. The reason for this is simple: the sense of touch in this context is less immediately informative and reliable than sight. While a police officer can generally determine immediately whether an item in plain view is contraband, an officer conducting a pat-down in most cases cannot be so sure. This is particularly so where, as here, the item is an especially small object that is never seen and only felt through an outer garment. *See Commonwealth* v. *Marconi*, 597 A.2d 616, 623 n.17 (Pa. Super. Ct. 1991) ("[W]hen an individual feels an object through a pants pocket, . . . the sense of touch is not so definitive. The structure and shape of a small packet is not unique so as to preclude other options as to what that item might be."), *appeal denied*, 611 A.2d 711 (Pa. 1992); *State* v. *Broadnax*, 98 Wash. 2d 289, 298, 654 P.2d 96, 102 (1982) *(en banc)* ("The tactile sense does not usually result in the *immediate* knowledge of the nature of the item.") (emphasis in original).[4]

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[4] Petitioner cites three studies -- essentially all by the same authors -- to support the contention that "haptic identification" can be as reliable as sight. Pet. Br. 15 n.10. However, petitioner makes no claim that these studies assessed the reliability of haptic identification in situations where, as here, the touched object is felt through an outer garment.

More significant, petitioner ignores the conclusions reached by numerous experts that the sense of touch can be *less* accurate than vision in many contexts. *See, e.g.*, B. Jones, *The Developmental Significance of Cross-Modal Matching*, in Intersensory Perception and Sensory Integration 109, 123, 131 (R. Walk & H. Pick, Jr. eds. 1981) ("the few studies which have compared visual and tactual judgments of surface texture show that visual judgments are typically more efficient, being either more accurate . . . , less variable . . . , or more rapid . . . ."; as compared to tactual processing, "[v]isual processing is clearly the more accurate and immediate"); B. Jones & S. O'Neil, *Combining Vision and Touch in Texture Perception*, 37 Perception and Psychophysics 66, 66 (1985) ("The

(continued...)

2. A "plain feel" exception will produce serious privacy intrusions entirely absent from the "plain view" setting.

Further distinguishing the "plain feel" situation from the "plain view" setting is that the level of governmental intrusiveness in the former is far greater than the latter. This Court has emphasized that "[i]f an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy." *Horton* v. *California*, 496 U.S. at 133 (citations omitted); *see also Soldal* v. *Cook County*, 61 U.S.L.W. 4019, 4022 (Dec. 8, 1992); *Payton* v. *New York*, 445 U.S. 573, 587 (1980). According to this Court's reasoning, an individual cannot legitimately claim a reasonable expectation of privacy in an object exposed to plain view.

A "plain feel" exception, on the other hand, would necessarily implicate significant privacy interests. Unlike the individual who leaves personal items exposed to plain view, respondent here manifested a legitimate and reasonable intention to keep the object in his pocket private. Consequently, when Officer Rose touched, slid and manipulated the object,

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[4](...continued)
evidence is clear that visual judgments of form are made more efficiently than the corresponding haptic judgments."); I. Rock & C. Harris, *Vision and Touch*, 216 Scientific American 96, 96 (1967) ("[T]he sense of touch seems far too imprecise to be the source of the accurate perception of form and space that is achieved through vision."); D. Warren & M. Rossano, *Intermodality Relations: Vision and Touch*, in The Psychology of Touch 119, 123, 124 (M. Heller & W. Schiff eds. 1991). Indeed, even in one of petitioner's own studies, the observation was made that "[t]he dimension of shape is particularly problematic for haptics, both in an absolute sense and relative to vision." R. Klatzky, S. Lederman & C. Reed, *There's More to Touch than Meets the Eye: The Salience of Object Attributes for Haptics With and Without Vision*, 116 J. Experimental Psychol.: General 356, 358 (1987).

respondent's expectations of privacy were violated. Such violations would be inevitable under a doctrine that would tolerate the warrantless touching and feeling of objects hidden in a person's clothing beyond the limited scope of a *Terry* pat-down for weapons. *See* Comment, *The Case against a Plain Feel Exception to the Warrant Requirement*, 54 U. Chi. L. Rev. 683, 703 (1987).

Because touch in this context is less informative than sight, the police will likely need to (or want to) conduct more intrusive, thorough and protracted "plain feel" *Terry* frisks, while they struggle to determine the nature of a felt object. Indeed, a "plain feel" exception might well encourage officers to commence a *Terry* frisk where they otherwise would not have, merely so they can discover if the suspect possesses contraband. Still worse, such an exception may prompt the police to conduct full-scale searches of all detainees. As such, the privacy protections carefully built into *Terry* -- and in no way threatened by the "plain view" doctrine -- would be seriously eroded.

It also seems certain that under a "plain feel" regime, many entirely innocent, everyday items carried by people will inevitably be subject to intrusive manipulation, squeezing, pinching, touching and seizing by officers who mistake these objects for contraband. For example, to an officer's touch, bottles of aspirin might feel like bottles of illegal drugs; lipstick, thimbles, change holders and pill containers might feel like crack vials; food, medicine and vitamins wrapped in tinfoil, plastic, cellophane or paper may feel like drugs packaged in such types of wrappers; currency, notes, letters, photographs and papers might feel like wrappers or envelopes containing drugs; pens, pencils, pipes, lighters and makeup products may feel like crack pipes or syringes; and beepers, calculators, wallets, jewelry, camera lens cases, hygiene products, cassette tapes, cigarette boxes, makeup kits and change purses might feel like the countless different containers/objects that can be used to store narcotics. No

amount of "police experience" will eliminate these inherent uncertainties from the realm of a "plain feel" exception.[5]

Under petitioner's "plain feel" exception, however, an officer would feel entitled to slide, squeeze and manipulate all of these objects in the course of a warrantless *Terry* search conducted only on the basis of reasonable suspicion. *See Commonwealth* v. *Marconi*, 597 A.2d at 623 ("[T]he minute amount of drugs that was found on Marconi's person could not have been identified through the sense of touch. The object is as consistent in feeling with a button or an aspirin as it is with methamphetamine. To sanction a search under the facts of this case would be to allow police officers to assume that all small objects in one's pocket could be drugs. This, we can not do.") (footnotes omitted). Such intrusive police actions -- entirely alien to the "plain view" setting -- vividly illustrate the differences between "plain view" and "plain feel."[6]

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[5] Besides privacy infringements, the police will also be interfering with possessory interests when they temporarily seize such innocent items of personal property. And of course, these "seizures of property are subject to Fourth Amendment scrutiny" just as any search may be. *Soldal* v. *Cook County*, 61 U.S.L.W. at 4022; *see also Horton* v. *California*, 496 U.S. at 133-34 ("A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property. . . . A seizure of [an] article . . . would obviously invade the owner's possessory interest.") (footnote and citations omitted).

[6] Even if this Court were to adopt a "plain feel" exception, there remains the issue of delineating the appropriate level of suspicion necessary to justify invoking the exception. Given the significant intrusions that would be occasioned by a "plain feel" exception, as well as the inherent unreliability of the sense of touch, a standard higher than probable cause -- one of "reasonable certainty" -- is far preferable. *See, e.g.*, *United States* v. *Williams*, 822 F.2d 1174, 1184-85 (D.C. Cir. 1987) (to invoke the "plain touch" exception, more than probable cause is needed; the officer must have a "reasonable certainty that the container holds contraband or evidence of a crime"); *State* v. *Vasquez*, 112 N.M. 363, 368, 815 P.2d 659, 664 (N.M. Ct. App.) ("the 'plain touch' (continued...)

B. A "plain feel" exception would jeopardize the effective and manageable bright-line *Terry* rule.

By affirming the Minnesota Supreme Court's decision, this Court would preserve the clearly defined *Terry* rule now in place: a limited protective search is justified *only* where the suspect is considered armed and dangerous. Currently, police officers know that they may not search for contraband during a *Terry* stop.

This line is an easy one for the courts to administer -- certainly far easier to monitor and enforce than would be the case in a "plain feel" regime. With a "plain feel" exception, the courts will be drawn into the daunting and time-consuming task of determining when the nature of a minute, unremarkable object was "immediately apparent" to the officer and when, as here, it was not. Thus, by preserving the bright-line approach of *Terry*, the Court would maintain the judiciary's ability to safeguard the careful balance the *Terry* Court drew between the privacy rights of the citizenry and the safety concerns of the police.

Nor should the Court upset this delicate *Terry* balance merely because of some attraction to "plain feel" based on claimed police efficiency. This Court has often emphasized that even where the efficiency of law enforcement is enhanced, that simply cannot justify unconstitutional police procedures. *See, e.g.*, *Mincey* v. *Arizona*, 437 U.S. at 393;

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[6](...continued)
exception applies only if a lawful touching convinces the officer to a reasonable certainty that the container holds contraband or other evidence of a crime"), *cert. denied*, 112 N.M. 363, 815 P.2d 1178 (1991).

see also Arizona v. *Hicks*, 480 U.S. at 329. And here any claim of efficiency is more imaginary than real.[7]

Indeed, a number of courts have rejected a "plain feel" exception, notwithstanding the possibility of improved efficiency. *See, e.g., State* v. *Collins*, 139 Ariz. 434, 435-36, 437, 679 P.2d 80, 81-82, 83 (Ariz. Ct. App. 1983) (Where the "state appears to claim a 'plain feel' exception to the Fourth Amendment," court invalidated a search and seizure in which officer "felt 'soft' objects which were obviously not weapons."); *State* v. *Rhodes*, 788 P.2d 1380, 1381 (Okl. Crim. App. 1990) (Court noted that "[t]he scope of a '*Terry* pat-down' is and must be strictly limited to a search for offensive weapons. When in the course of a frisk the officer feels an object, he is not justified in seizing it unless it reasonably resembles an offensive weapon.") (citations omitted); *Commonwealth* v. *Marconi*, 597 A.2d at 623 n.17, 624 (Court rejects a "plain touch" exception, noting that "[w]e can not lose sight of the fact that this began as a *Terry* frisk.

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[7] *See, e.g.*, R. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 Cal. L. Rev. 539, 588 & nn. 266-67 (1990) ("Studies of the Federal system show that only 0.4% of matters that U.S. Attorneys declined to prosecute were rejected primarily because of a search and seizure problem. Of prosecuted federal defendants, only 11% filed a motion to suppress on fourth amendment grounds; evidence was excluded on such grounds in only 1.3% of cases, and half of the cases in which evidence was excluded still ended in conviction.") *(citing* Comptroller Gen. of the U.S., *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* 8-9, 11, 13-14 (1979)); P. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 Am. B. Found. Res. J. 585, 606 (1983) ("Given the results of the empirical analysis it seems clear that the exclusionary rules . . . have a truly marginal effect on the criminal court system."); D. Dripps, *Living with Leon*, 95 Yale L. J. 906, 915 & n.63 (1986) ("overwhelming empirical evidence confirm[s] the [exclusionary] rule's negligible cost in terms of convictions lost by suppression rulings") (see sources cited therein).

Once the officer was satisfied that Marconi was not armed and dangerous, the inquiry should have ended.").[8]

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[8] Those courts that have adopted a "plain feel" exception have generally done so in factually distinguishable contexts. Indeed, the case law can essentially be divided into four separate categories, all of which are wholly distinct from the present case: (i) cases where the touched object was clearly a weapon, *see, e.g., United States* v. *Coleman*, 969 F.2d 126, 128 (5th Cir. 1992) (per curiam) (handgun felt in suspect's pouch); *United States* v. *Portillo*, 633 F.2d 1313, 1315 (9th Cir. 1980) (gun felt in paper bag found in car trunk), *cert. denied*, 450 U.S. 1043 (1981); *People* v. *Chavers*, 33 Cal.3d 462, 466, 189 Cal. Rptr. 169, 171, 658 P.2d 96, 98 (1983) (gun felt in shaving kit discovered in glove compartment) -- under *Terry*, of course, such weapons can be seized; (ii) cases where the touched object was located not on the suspect's person, but rather, in a separate container, *see, e.g., United States* v. *Williams*, 822 F.2d at 1176-77 (brown paper bag); *United States* v. *Ocampo*, 650 F.2d 421, 425 (2d Cir. 1981) (paper bag); *Henderson* v. *State*, 535 So.2d 659, 660-61 (Fla. Dist. Ct. App. 1988) (deodorant container found inside luggage); (iii) cases where the item was obviously and unmistakably contraband when it was first touched, so that no further search beyond the limited scope of *Terry* was required, *see, e.g., United States* v. *Ceballos*, 719 F. Supp. 119, 127 (E.D.N.Y. 1989) (agent felt a large package that "was a solid mass, about five inches by four inches by one inch"); *United States* v. *Pace*, 709 F. Supp. 948, 951 (C.D. Cal. 1989) (detective felt "two kilos of cocaine packaged in the form of 'bricks'"), *aff'd*, 893 F.2d 1103 (9th Cir. 1990); and (iv) cases where the officer reached into a suspect's clothing because he had felt a hard object of some size (and where it appears that the officer was uncertain as to whether it was a weapon), *see, e.g., United States* v. *Buchannon*, 878 F.2d 1065, 1066 (8th Cir. 1989).

In sharp contrast, this case involves the touching of a minuscule object that was hidden within the pocket of a knowingly unarmed suspect. As such, these cases could not possibly have addressed those "plain feel" implications presented here. The decisions embracing a "plain feel" exception simply failed carefully to consider the various "plain feel" issues highlighted by this case: that touch is less reliable than sight, especially where a particularly small object is touched; that the degree of intrusiveness in a "plain feel" setting is greater than in the "plain view" context; and that a "plain feel" exception would replace the bright-line

(continued...)

III. THE FACTS OF THIS CASE DO NOT JUSTIFY RELIANCE UPON THE SEARCH INCIDENT TO ARREST EXCEPTION

In contrast to petitioner, the Solicitor General does not attempt to defend Officer Rose's seizure on the basis of a "plain feel" exception, and proffers instead that the seizure was a justified result of a search incident to arrest. S.G. Br. 20-22. The facts of this case do not support the Solicitor General's position any more than they do petitioner's. The necessary predicate for a proper application of the search incident to arrest doctrine is that the police have lawfully obtained the constitutionally required level of information to establish probable cause to arrest. *See, e.g., Rawlings* v. *Kentucky*, 448 U.S. at 111. That predicate is missing here. As we have shown above, Officer Rose only developed such probable cause through an *unlawful* search that went well beyond the scope authorized by *Terry*. Since probable cause was acquired by unconstitutional means, the fruits of the subsequent seizure must be suppressed. *See, e.g., Vale* v. *Louisiana*, 399 U.S. 30, 35 (1970).

On the factual determinations here of the Minnesota Supreme Court, there is no need for this Court to consider whether the search incident to arrest doctrine would justify a seizure in a case -- *unlike* this one -- where the police develop probable cause to believe a suspect possesses contraband in the course of an appropriately limited *Terry* pat-down for weapons. Such a decision should await a case that properly presents that question.

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[8](...continued)
Terry standard with a rule that will encourage the police to conduct full-scale exploratory searches.

CONCLUSION

The judgment of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

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Dated: December 21, 1992

NO. 91-2019

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1992

THE STATE OF MINNESOTA,
Petitioner,

v.

TIMOTHY DICKERSON,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ON THE MERITS IN SUPPORT OF RESPONDENT

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Defense Lawyers

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STATEMENT OF THE INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc., (NACDL) is a District of Columbia non-profit corporation with a nationwide membership of more than 5,000 lawyers and 25,000 affiliate members. NACDL was founded over 25 years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of attorneys who represent criminally accused citizens.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL is concerned with the protection of individual rights and the

improvement of the criminal law, its practices and procedures.

A cornerstone of this organization's objectives, and of the criminal justice system, is the fundamental constitutional protection afforded all individuals against unreasonable invasions of their personal privacy by governmental agents. NACDL is very concerned about any decision that would undermine or dilute this constitutional guarantee, as would adoption of the position taken by the petitioner in the instant case.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that the issues presented here are of such importance to the defense lawyers and citizens of this nation that the NACDL should offer its assistance to the Court. Both petitioner and respondent have consented to NACDL's participation as

amicus curiae pursuant to Rule 37.3 of the Rules of this Court, and letters of consent have been filed with this Court.

SUMMARY OF THE ARGUMENT

I. The factual record in this case presented to this Court by the opinion and judgment of the Minnesota Supreme Court does present the question the State of Minnesota asks this Court to answer. Accordingly, the petition for certiorari should be dismissed by this Court as improvidently granted.

The State of Minnesota has asked this Court to decide whether it should be hold that a "plain feel" exception to the fourth amendment warrant requirement exists when an officer develops p. ble cause to believe an individual possesses contraband or evidence of the crime "through the sense of touch during a lawful pat-down." (Petition at i). The manner in which this question is framed assumes that the factual findings presented to this Court are those of the Minnesota trial court.

However, the factual record presented to this Court are the fact-bound conclusions of the Minnesota Supreme Court to the effect that Officer Rose "set out to flaunt the limitations of *Terry* and he succeeded." 481 N.W.2d 840, 844 (Minn. 1992). The Minnesota Supreme Court further concluded that Officer Rose could not have immediately known that the lump in Mr. Dickerson's pocket was contraband because of the extensive manipulation of that item he undertook prior to making his determination that he would remove the item from the pocket. The Minnesota Supreme Court's fact-bound findings in this regard are entitled to deference by this Court.

Accordingly, the factual prerequisites to the presentation of the "plain feel" issue articulated by the State of Minnesota in its petition are not present on the record presented to this

Court. Therefore, the writ of certiorari should be dismissed as improvidently granted.

II. A. The decision of the Minnesota Supreme Court to suppress the contraband seized from Mr. Dickerson's pocket should be affirmed. The companion case to *Terry v. Ohio*, *Sibron v. New York*, 392 U.S. 40 (1968) remains the law of this Court. The facts of this case are constitutionally indistinguishable from those presented in *Sibron* and accordingly, *Sibron v. New York* controls the resolution of the questions presented in this case.

B. In the event that the Court concludes that *Sibron* is not controlling, a plain feel exception to the warrant requirement is not justified by the facts presented here and would constitute an unreasonable invasion of personal privacy that this Court should not sanction. *Terry*

v. Ohio authorized a brief and limited pat-down search of the outer clothing of an individual that is suspected of criminal conduct solely on the basis that it was necessary to protect the safety of police officers and passers by. Once the safety justification is removed, any further intrusion upon the privacy of the person's clothing is not justified.

Feeling or touching an individual's outer clothing is a significantly greater invasion of personal privacy than mere observation. Accordingly, the "plain feel" doctrine is far more than a mere corollary to the plain view doctrine. The feeling necessary to "recognize" an object is in itself a search requiring probable cause. This point significantly distinguishes feeling from observation by other senses. This point is further confirmed by the fact that Officer

Rose's action in this case is constitutionally indistinguishable from the action at issue in *Arizona v. Hicks*, 481 U.S. 321 (1987).

C. There is further no officer safety justification for the adoption of a plain feel exception to the warrant requirement of the Fourth Amendment.

D. Finally, in the event that this Court chooses to adopt a "plain feel" exception of the warrant requirement of the Fourth Amendment, the exception should be properly limited. A properly limited plain feel exception to the warrant requirement would require suppression of the contraband at issue in this case.

ARGUMENT

I. THE FACTS OF THIS CASE DO NOT PRESENT THE QUESTION THE STATE OF MINNESOTA ASKS THIS COURT TO ANSWER: THE PETITION FOR CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

A. The Officer's Testimony and Trial Court Findings

Officer Vernon D. Rose of the City of Minneapolis Police Department testified at the suppression hearing in this case in pertinent part as follows:

Q: Why did you stop that individual [Dickerson]?

A: **To check him for weapons and contraband.**

(T. 22) (emphasis supplied).

Q: Now what did you do after you made the stop?

A: **I pat-searched the party for weapons and contraband . . .**

Q: Describe how you conducted the search then.

A: I started down from the shoulders to the underarms. I then went across the waist band and I came back up to the chest and I hit a nylon

jacket that had a pocket and the nylon jacket was very fine nylon and as I pat-searched the front of his body **I felt a lump, a small lump, in the front pocket. I examined it with my fingers** and it slid and it felt to be a lump of crack cocaine in cellophane.

Q: Up to the point had you checked inside of any pockets?

A: No. Just patting the outside.

Q: Why did you think that it felt like crack?

A: Because I felt it before in clothing.

Q: What did you do then?

A: I removed the piece of crack cocaine.

Q: And it was in fact --

A Suspected crack cocaine, yes.

Q: Was it in a container of any sort or was it just laying loose in the pocket.

A: **It was in like a sandwich-wrapped material with a knot tied on it. You could feel the knot through the nylon also.**

Q: **How certain were you at that point that it was in fact crack cocaine before you took it out?**

A: **I was absolutely sure that's what it was, or I would have left it in there.**

Q: **Okay. Then the first thing you said to him was, "Put your hands on the hood of the car"?**

A: **Yes.**

Q: **And then you conducted a search?**

A: **Correct.**

(T. 19) (emphasis supplied).

In further describing Mr. Dickerson's jacket, Officer Rose stated that he did not notice any bulges in his pockets and that he remembered the jacket as being "kind of fluffy . . . ." (T. 20).

Based upon this testimony, the trial court found that Officer Rose conducted a pat-search of the defendant for **weapons** [not drugs] and during this pat-search he "felt a small, hard object wrapped in plastic in the defendant's pocket." (Trial Court Order) (Petition Appendix C-2)(emphasis supplied). The trial court further concluded that during this pat search for "weapons", Officer Rose felt the object that he promptly concluded was crack cocaine based upon its feel through Mr. Dickerson's jacket pocket. (Petition Appendix C-5).

Thus, the trial court found that the seizure of the contraband in this case occurred as a result of Officer Rose developing probable cause to believe that the contraband was in Mr. Dickerson's pocket through Officer Rose's sense of

touch during a lawful pat down search of Mr. Dickerson for weapons. Id.

However, this version of the factual circumstances under which the seizure occurred was rejected by the highest court of the State of Minnesota.

B. The Factual Record Before this Court -- The Facts as Found by The Minnesota Supreme Court

The Minnesota Supreme Court reviewed the factual record presented in this case and rejected the trial court's finding that "when the officer felt the defendant's jacket pocket, he knew immediately he was feeling a plastic bag containing a lump of crack cocaine." *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992). The Court found "the officer's 'immediate' discovery [of the crack cocaine] in this case [to be] fiction, not fact." Id. The Minnesota Supreme Court pointed out that the officer testified he was sure that he had found

crack cocaine only after first feeling a lump, manipulating it with his fingers, and sliding it within the defendant's pocket; testimony that did not support the view that the officer immediately knew what he had touched in Mr. Dickerson's pocket. The Minnesota Court further relied upon the officer's own testimony as to his intentions when he stopped Mr. Dickerson: to conduct a search -- not a protective frisk -- for weapons and drugs.

The factual finding presented to this Court by the Minnesota Supreme Court is that Officer Rose "set out to flaunt the limitations of *Terry* and he succeeded." 481 N.W.2d at 844. Thus, the factual findings presented to this Court are far different than the factual record assumed by the issue presented to this Court has been framed.

C. The Question This Court is Asked to Decide

The State of Minnesota has framed the issue presented based upon the trial court's conclusion that Officer Rose developed probable cause to believe that Mr. Dickerson possessed the contraband through his sense of touch during a lawful pat down. (Petition at i).

This question assumes a number of fact-bound findings made by the trial court but rejected by the Minnesota Supreme Court.

First, the question assumes that Officer Rose was conducting a lawful protective frisk as opposed to merely a warrantless search for contraband.

Second, the question presented assumes that Officer Rose had probable cause to believe that the item in Mr. Dickerson's

pocket was contraband as soon as he touched it.

Third, the question presented further assumes that the officer's action in manipulating the contents of Mr. Dickerson's pocket in order to determine what was in it were within the bounds of permissible action under a *Terry v. Ohio* protective frisk.

If all of these findings were supported by the factual record in this case then it would properly present the issue this Court has been asked to decide: Should there be a "plain feel" exception to the warrant requirement to permit the warrantless search of an individual based upon facts "felt" during a lawful *Terry* protective frisk. However, these are not the findings presented to this Court. The Minnesota Supreme Court found that each of these fact-bound questions should be

answered in the negative based upon its review of the record presented. The conclusions of the Minnesota Supreme Court on these fact-bound questions are entitled to deference by this Court.

This Court has long had a tradition of deference to state court findings on fact-bound questions. See, e.g., *Grayson v. Harris*, 267 U.S. 352, 357-58, (1925) (refusing to re-evaluate State Supreme Court finding that the parties to the case were citizens of the (Creek nation); *Lloyd A., Fry Roofing Company v. Wood*, 344 U.S. 157, 160 (1953) (rejecting effort to set aside State Supreme Court conclusion that the leases at issue were shams and stating: "There are no exceptional circumstances of any kind that would justify us in rejecting the Supreme Court's finding; they are not without factual foundation, and we accept them.")

Contrary to this long standing tradition of deference to fact bound findings made by state courts, the State of Minnesota urges this Court to re-evaluate the Minnesota Supreme Court's findings and conduct an "independent review of the record."

The state relies upon *Ker v. California*, 374 U.S. 23, 34 (1963) in its effort to persuade this Court to cast aside the fact-bound conclusions of the Minnesota Supreme Court. (Petitioner's Brief on the Merits, at 32).

The quotation included in the petitioner's brief is understandably incomplete. The *Ker* Court stated that it would undertake such a "independent examination of the facts, the findings and the record" in order to determine for itself whether the state court's decision as to the reasonableness of the privacy

intrusion being considered met the constitutional criteria this Court had established. The complete quotation is:

> While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental - i.e., constitutional criteria established by this Court have been respected.
>
> 374 U.S. at 34 (emphasis supplied).

The *Ker* Court made clear that this re-examination of state fact finding would be conducted only for the benefit of the citizen -- not the state -- in order to make sure that the state's determination as to the reasonableness of its agents' action did not violate the federal constitutional criteria this Court had established. Id.

Under these circumstances, the "independent examination" described in *Ker v. California* has no place. The Minnesota Supreme Court's fact-bound findings in this regard are entitled to deference by this Court.

D. Because the Issue this Court is Asked to Decide is Not Presented by the Factual Record, this Court Should Dismiss the Grant of Certiorari

It is, of course, without question that this Court has the authority to dismiss a writ of certiorari as being granted improvidently. See e.g., *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959).

As stated by Justice Frankfurter in *Armstrong v. Armstrong*, 350 U.S. 568, 572 (1956), "[a]fter a case has been heard on the merits, it is to be disposed of on the precise issue that full study of the case discloses, and not on the basis of the

preliminary examination of the questions that were urged in the petition for certiorari." Plenary consideration, in other words, may "shed more light on [a] case than in the nature of things was afforded at the time the petition for certiorari was considered." *Belcher v. Stengel*, 429 U.S. 118, 119 (1976).

Clearly one basis upon which a writ of certiorari can be dismissed as improvidently granted is that after plenary review, it is found that an important issue is not presented by the record. See e.g., *Iowa Beef Packer's, Inc., v. Thompson*, 405 U.S. 228 (1972); *McClanahan v. Morauer & Hartzel*, 404 U.S. 16 (1971). Certainly, another grounds upon which certiorari can be properly dismissed is that the question as to which certiorari was granted is not "presented with sufficient clarity in [the] case." *Kimbrough v. United States*, 364

U.S. 661 (1961). Alternatively, the record may not be "sufficiently clear and specific to permit decision of the important constitutional questions involved in the case." *Massachusetts v. Painten*, 389 U.S. 560, 561 (1968); see also, *Johnson v. Massachusetts*, 390 U.S. 511 (1968); *Smith v. Mississippi*, 373 U.S. 238 (1963); and *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968).

Here, the issue the Court has been asked to decide is not presented by the record unless the Court is prepared to cast aside the fact-bound conclusions of the highest court of Minnesota. At the very least, the question is not presented with sufficient clarity on the facts of this case for this Court to embark upon analysis of whether another exception to the warrant requirement should become a part of this Court's fourth amendment jurisprudence.

In the event that this Court should at some point choose to embark upon this examination, it should be able to undertake it in a case without having to re-examine intensely factual questions and trample factual conclusions made by a state supreme court.

II. THE DECISION OF THE MINNESOTA SUPREME COURT SHOULD BE AFFIRMED

A. *Sibron v. New York* Controls the Disposition of this Case

Terry v. Ohio, 392 U.S. 1 (1968) is the law. *Terry* held that a law enforcement officer who has stopped an individual he suspects is involved in criminal conduct must have "narrowly drawn authority to [conduct] a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for

a crime." 392 U.S. at 27. *Terry* further made clear that the limited search it authorized was not justified by any need to prevent the disappearance or destruction of evidence of a crime. 392 U.S. at 29. Instead, the "sole" justification of the search *Terry* authorized is the protection of the police officer and others nearby and accordingly must be confined in scope "to an intrusion reasonably designed to discover guns, knives, clubs or other hidden instruments for the assault of the police officer." 392 U.S. at 29.

The *Terry* Court affirmed Officer McFadden's action because he merely patted down the outer clothing of Terry and his companions and did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons there. Officer McFadden did not conduct a general exploratory search for whatever

evidence of criminal activity he might find. Id. at 30. Under *Terry*, an officer is therefore authorized to conduct a "carefully limited" search of the outer clothing of the individual stopped "in an attempt to discover weapons which might be used to assault him." Id. at 30.

On the same day the *Terry* opinion was issued, this Court decided *Sibron v. New York*, 392 U.S. 40 (1968). In *Sibron*, a Brooklyn patrolman named Anthony Martin conducted an eight hour surveillance of Nelson Sibron, watching him converse with six or eight persons who Martin knew from past experience to be narcotics addicts. 392 U.S. at 45. Martin observed Sibron in a restaurant late in the evening and observed him talking with three more known narcotics addicts. Sibron then sat down and ordered pie and coffee. Id. While Sibron was eating, Patrolman Martin

approached him, told him to come outside and then told Sibron "You know what I am after." Id. Sibron then "mumbled something and reached into his pocket." Id. Simultaneously, Patrolman Martin thrust his hand into Sibron's pocket and discovered a number of glassine envelopes which contained heroin. Id.

The *Sibron* Court held that Officer Martin did not have reasonable grounds to believe that Sibron was armed and dangerous and accordingly was not justified in conducting a self-protective search for weapons. Id. at 64.

More importantly, however, is Sibron's holding that even assuming that Officer Martin had an adequate grounds to search for weapons, "the nature and scope of the search conducted by Patrolman Martin were so clearly unrelated to that justification as to render the heroin inadmissible." Id.

at 65. This Court concluded that Patrolman Martin's testimony showed that he was looking for narcotics and that he found them. Accordingly, the search he conducted was not reasonably limited in scope to the accomplishment of the only goal which could have justified its inception; that is, the protection of the officer by disarming a potentially dangerous individual. Id.

In the instant case, the Minnesota Supreme Court's application of *Terry* to the facts presented here is on all fours with this Court's application of *Terry* to the facts presented in *Sibron*. Like Patrolman Martin, Officer Rose was looking for narcotics. Like Patrolman Martin, Officer Rose's examination of the tiny lump he felt in Mr. Dickerson's pocket was wholly unrelated to a search for weapons. Like Patrolman Martin's search, Officer Rose's search was "not reasonably limited in scope

to the accomplishment of the only goal which might conceivably have justified its inception -- the protection of the officer by disarming a potentially dangerous man." *Sibron*, 392 U.S. at 65. Like Patrolman Martin's search, Officer Rose's search violated the guarantee of the Fourth Amendment which protects the sanctity of the person against unreasonable intrusions by government agents. Id.

Sibron v. New York is the law. Unless this Court is prepared to overrule *Sibron* -- which NACDL amicus respectfully suggests would be a decision without justification -- the application of *Sibron v. New York* to the facts of this case requires the affirmance of the Minnesota Supreme Court's decision.

B. A Plain Feel Exception to the Warrant Requirement is an Unjustified and Unreasonable Invasion of Personal Privacy that this Court Should Not Sanction

1. A Plain Feel Exception is Not a Logical Extension of *Terry*

Petitioner contends that because police officers may properly rely upon their sense of touch to conclude that an object may be a weapon under *Terry v. Ohio*, the "logical extension of *Terry* is to permit police to conclude that other objects felt during a proper pat-search are contraband or other evidence of a crime." (Petitioner's Brief, at 19).

Terry v. Ohio is not about what physical sense an officer may rely upon to conclude that he has probable cause to conduct a search. *Terry v. Ohio* is about permitting an officer to protect himself during an investigatory stop by conducting a carefully limited search of the outer clothing of the individual he has stopped.

This Court, in *Terry*, recognized that the limited search it was authorizing was a "severe, though brief, intrusion upon cherished, personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." 392 U.S. at 25. The *Terry* Court found that the "sole justification" for the carefully drawn authority it gave police officers was the imperative need to protect the officer and those in the area. Id. at 31.

This Court made clear in *Sibron v. New York* that once the need to protect the officer was removed, any intrusion upon the personal privacy of an individual thereafter was constitutionally unreasonable. *Sibron v. New York*, 392 U.S. 64, 65 (1968). Accordingly, *Terry* is far from a building block for the position the petitioner urges this Court to adopt. *Terry* is a significant stumbling block for

the petitioner to overcome in its effort to persuade this Court to adopt yet another exception to the warrant requirement of the Fourth Amendment to the United States Constitution.

2. Feeling is More Invasive than Seeing or Smelling: The "Plain Feel" Doctrine is not a Mere Corollary to the Plain View Doctrine

That feeling or touching is a more significant invasion of personal privacy than mere observation with either eyes or nostrils should be without question. If a stranger observes us walking down the street, we think nothing of it. If a stranger smells our cologne or perfume and comments, we are either complimented or our suspicions concerning their intentions are raised. But, if a stranger feels our pockets in order to determine what is in them, we are, at a minimum, significantly offended. Depending upon the proximity of

the pocket to our intimate body parts, we may even contact a law enforcement officer to report a crime.

It is against this back drop of our societal sensibilities that *Terry v. Ohio* was written. The limited feeling of outer clothing was found justified, as discussed above, only if facts were present to lead a reasonable police officer to believe that the individual suspect was armed and dangerous to the officer and to the community as a whole. The need to search for and preserve evidence was held in *Terry* not to be a sufficient justification to permit the feeling of a person's body without the judicial authorization of a warrant or facts sufficient to establish probable cause to place that individual under arrest. *Terry*, 392 U.S. at 29.

Another reason that the plain feel exception advocated here is far more than a

mere corollary to the plain view doctrine is that to "recognize" an object through the tactile sense is in itself a search requiring probable cause. The detection of evidence by sight or smell can, of course, be accomplished without the physical intrusion of one's person; however, this is not so with respect to evidence discovered by touch. Evidence seen or smelled before any physical intrusion may be relied upon to establish probable cause to arrest and search an individual. In sharp contrast, one cannot search first to gather evidence to establish probable cause needed to justify the initial intrusion were the law otherwise, the requirement of probable cause would be turned on its head. See generally, *Smith v. Ohio*, 494 U.S. 541 (1990). See also, *State v. Broadnax*, 654 96, 102 (Wash. 1982) (en banc).

On the record before this Court there can be little question that Officer Rose conducted a search of Mr. Dickerson's pocket to "recognize" the object that he concluded was crack cocaine. During Officer Rose's pat-down of Mr. Dickerson, he "felt a lump, a small lump in the front pocket of the very fine nylon jacket." (T. 19). Officer Rose made no claim that he believed this lump to be a weapon.

Under *Terry*, his ability to further probe the item was circumscribed.

Contrary to the contention of the United States' amicus brief, the examination of the item by Officer Rose with his fingers through the jacket pocket was far more than a "momentary manipulation." Officer Rose testified that he examined it to the extent that he was able to determine that it "slid", that it was in like a "sandwich wrapped material

with a knot tied on it. You could feel the knot through the nylon also." (T. 19). It defies logic to contend that the detail with which Officer Rose described this item in Mr. Dickerson's pocket **before** he removed it, could be obtained by a manipulation of that object that was "merely a continuation of a lawful protective search for weapons." (Brief for United States as Amicus Curiae, at 13). The manipulation of the item in Mr. Dickerson's pocket which Officer Rose knew not to be a weapon is precisely the action *Terry* held was impermissible.

Officer Rose's action is constitutionally indistinguishable from Officer Nelson's action at issue in *Arizona*

v. Hicks, 481 U.S. 321 (1987).[1] In *Arizona v. Hicks*, Officer Nelson was lawfully in the petitioner's apartment. While there, he saw stereo equipment that seemed out of place. He suspected that the equipment was stolen and moved some of the components to read and record their serial numbers. Using this information, he learned that some of this equipment had been taken in an armed robbery and Hicks was subsequently indicted for the robbery.

This Court held that Officer Nelson's moving of the equipment constituted a search separate and apart from the search that was the lawful objective of Officer Nelson's entry into the apartment. 480

[1] Not surprisingly, the United States as Amicus Curiae goes to great lengths to distinguish Officer Rose's action from the conduct this Court found to violate the Fourth Amendment in *Arizona v. Hicks*, 481 U.S. 321 (1987). For the reasons that will be discussed, *Hicks* is indistinguishable.

U.S. at 324-325. This Court held that merely inspecting the parts of the turn table that were in view during the lawful search would not have constituted an independent search; but, that taking action "unrelated to the objectives of the authorized intrusion" which exposed to view the concealed portions of the apartment or its contents produced a new invasion of Hicks' privacy that was unjustified by the exigent circumstances that justified the officer's entry. Id.

The Court then concluded that this "search" was constitutionally unjustified because Officer Nelson lacked probable cause to believe that the stereo equipment was stolen. 480 U.S. at 328.

In this case, Officer Rose's action in manipulating the object he knew immediately not to be a weapon was wholly unrelated to the objectives of the authorized intrusion

of Mr. Dickerson's personal privacy: the pat-down search for weapons. As in *Hicks*, although Officer Rose had a lawful right to touch Mr. Dickerson's pocket, he conducted a separate and independent search through his detailed examination of the item therein through the jacket material. His search of the pocket to bring this item into so called "plain view" was unlawful because it was not based upon probable cause. *Arizona v. Hicks*, 480 U.S. at 328-329.

3. The Plain "Feel" Exception is Wholly Unrelated to any Officer Safety Issue

Those who would advocate the adoption of the "plain feel" exception urge this Court to adopt a rule permitting the police to have the authority to remove items from an individual that the police know not to be a weapon. (See Brief of Amicus Curiae for Americans for Effective Law

Enforcement, Inc., at 8). The police officers of this nation are already authorized under *Terry v. Ohio* to conduct a pat-down search reasonably designed to discover and remove anything that might be a weapon. In this context, *Terry v. Ohio* gives the police officers of our nation all the protection necessary.

Illustrative of this point is a study conducted in 1972 showing that of the 112 police officers tragically killed in the line of duty that year, 108 of them were killed with firearms and two were killed with knives. Uniform Crime Reports for 1972 prepared by the Federal Bureau of Investigation (cited in *United States v. Robinson*, 414 U.S. 218, 234 n. 5 (majority opinion) and 255 n. 5 (1973) (Marshall, J. dissenting). Accordingly, in that year, virtually all of the officers murdered in the line of duty were killed with guns and

knives, precisely the type of weapons that will not go undetected in a properly conducted weapons frisk. See *Robinson*, 414 U.S. at 255 (Marshall, J. dissenting).

No party has cited to this Court more recent studies showing that there is in existence any new weapon available to the citizenry at large that cannot be detected by an officer through a properly conducted weapons frisk. There is also no further explanation why a rule that does not permit law enforcement officers to reach into a suspect's pocket, to remove something that the officer knows not to be a weapon but believes to be contraband or evidence of a crime, will cause those officers to **"hesitate under circumstances that could cost them their lives."** (Brief Amicus Curiae of Americans for Effective Law Enforcement, Inc., at 8 (emphasis in original)).

The membership of NACDL is likewise concerned about the safety of our nation's policeman, many of whom we work with regularly and call our friends. NACDL respectfully urges this Court, however, not to be taken in by the emotional claim that the rule the respondent in this case urges this Court to adopt will make it safer for the officer on the street when that rule is simply and wholly unrelated to the officer's ability to protect themselves while doing their job.

For all of these reasons, the "plain feel" exception to the warrant requirement is without justification sufficient to permit the warrantless pinching, squeezing, and probing of the contents of our citizen's pockets in an effort to ferret out contraband or evidence of a crime. The fourth amendment does not now permit such

action and this Court should not hold that it does.

C. If this Court Adopts a "Plain Feel" Exception to the Warrant Requirement of the Fourth Amendment, this Exception Should Have Limits and These Limitations Preclude its Application Here

For the reasons discussed previously, NACDL Amicus Curiae strongly urge this Court not to craft yet another exception to the warrant requirement of the Fourth Amendment to the United States Constitution. Such an exception constitutes a severe invasion of personal privacy that is not justified by either societal needs or the protection of officers in the line of duty.

Nonetheless, if this Court is inclined to add this exception to its fourth amendment jurisprudence, NACDL Amicus Curiae respectfully urges this Court to insure that such an exception is properly

limited in order to ensure that the "plain feel" exception remains grounded in its purported logical corollary -- the plain view doctrine.

First, inquiry should be made to determine whether the real aim of the search in question was the discovery or preservation of contraband rather than the immobilization of weapons. If so, the intrusion is not authorized by *Terry v. Ohio*. See *United States v. Williams*, 822 F.2d 1174, 1179 (D.C. Cir. 1987). Therefore, any "plain feel" exception would only apply where an officer is legally authorized to touch the individual's outer clothing in the first place. Id. at 1184.

Second, the requirement in traditional plain view situations that an officer have a "lawful vantage point" requires a parallel limitation upon the plain feel doctrine: "The doctrine would not sanction

any use of the sense of touch beyond that justified by the initial contact with the container or clothing." Id. Accordingly, once an officer has satisfied himself that no weapon is present in the clothing, he is not free to continue to manipulate it in an attempt to discern contents of the person's clothing. Id.

Finally, the invasion of an individual's clothing to recover something an officer believes to be contraband or other evidence of a crime should only be justified when the lawful touching of that outer clothing convinces the officer to a "reasonable certainty" that the clothing does indeed hold contraband or evidence of a crime. Id. The information in "plain view" as a result of the touching must be good enough to eliminate all need for additional search activity and can occur only when the sensory information acquired

by the officer "rises to a state of certitude, rather than mere prediction, in regard to the object of investigation." *Williams*, 822 F.2d at 1185.

The *Williams'* court addressed the application of a plain feel exception to the warrant requirement authorizing the opening of a container whose contents had become known through lawful touching of its outside. The prerequisites established by *Williams* that must be met before a container can lawfully be opened are even more clearly needed when the sanctity of an individual's own clothing is to be invaded based upon that which an officer feels from his touch of that clothing.

When these limitations are applied in the instant case, it becomes clear that a plain feel exception cannot be relied upon to justify the admission of the items seized from Mr. Dickerson.

Officer Rose knew clearly that the item in Mr. Dickerson's pocket was not a weapon but continued to manipulate the item in an attempt to ascertain its identity. *Williams*, 882 F.2d at 1184. Further, the lawful touching of the item in Mr. Dickerson's pocket must have given Officer Rose a "reasonable certainty" that the item he felt was contraband or evidence of a crime. The information available to Officer Rose by his lawful touch must be good enough to eliminate all need for further search activity. However, Officer Rose did not have that type of information from his lawful touching. Instead, he manipulated the item in the pocket significantly which was not lawful and accordingly cannot be relied upon in this case to provide him with the reasonable certainty that the item in Mr. Dickerson's

pocket was crack cocaine. *Williams*, 822 F.2d at 1185.

Accordingly, a properly limited "plain feel" exception of the warrant requirement, if adopted by this Court, would not justify Officer Rose's decision to reach into Mr. Dickerson's pocket to retrieve the item therein.

CONCLUSION

This case does not present the question this Court is asked to answer. Officer Rose did not develop probable cause to believe that Mr. Dickerson had contraband in his pocket based upon his lawful examination of Mr. Dickerson's outer clothing.

Officer Rose set out to accomplish a warrantless search of Mr. Dickerson for contraband and did just that. If this Court is inclined to resolve the question whether a warrant requirement of the Fourth

Amendment of the United States Constitution contains an exception for things plainly felt as it does for things plainly viewed, it should do so in a case where a law enforcement officer did plainly feel something obviously contraband during the course of his lawful conduct. This Court should dismiss the grant of the writ of certiorari.

Terry v. Ohio is the law. The limited authorization it gives our nation's officers to conduct protective pat-down searches is fully justified by the need to protect officers and other citizens. This severe intrusion into personal privacy is not and should not be held to be justified by anything short of the need to protect officers in their line of duty. The "plain feel" exception to the warrant requirement advocated in this case is not the next logical step from *Terry* and this Court's

jurisprudence -- it is an unnecessary and unjustified step that will erode the integrity of the protection the Fourth Amendment provides all citizens.

For all these reasons, NACDL as amicus curiae respectfully requests this Court to dismiss the writ of certiorari in this case or alternatively, to affirm the judgment of the Minnesota Supreme Court.

Respectfully submitted,

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